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Supreme Court, U.S.
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No. 00-____

IN THE

Supreme Court of the United States

BALTIMORE SCRAP CORP.,

Petitioner,

v.

THE DAVID J. JOSEPH COMPANY, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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96 pp

QUESTIONS PRESENTED

In *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49, 61-62 n.6 (1993), this Court expressly left open the question whether the *Noerr-Pennington* doctrine "permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations." The questions presented are:

1. Whether the Fourth Circuit below erred in holding that any fraud exception to *Noerr-Pennington*, if one exists, extends only to fraud that deprives the litigation of its legitimacy—thereby adding to the conflict among the Second, Third, Fifth, Sixth, Ninth, Eleventh, and District of Columbia Circuits as to the existence and scope of a fraud exception.

2. Whether the Fourth Circuit—in direct conflict with the Fifth and Ninth Circuits—erred in holding that *Noerr-Pennington* immunity protects non-parties who conceal their funding and direction of litigation from both the parties and the court and who do not have standing to file suit themselves.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner Baltimore Scrap Corp. was the appellant and plaintiff below. Baltimore Scrap Corp. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Appellees and defendants below and respondents in this Court are The David J. Joseph Company, t/a United Iron & Metal Company; David J. Workum, III; John Does 1-10; I.D. Shapiro; Charles Baum; United Holdings Company, Inc.; United Operating Company, Inc.; and United Investment Enterprises Partnership.

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PETITION FOR A WRIT OF CERTIORARI

Baltimore Scrap Corp. ("Baltimore Scrap") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 237 F.3d 394 and reproduced in the appendix hereto ("App.") at 1a. The opinion of the District Court is reported at 81 F. Supp. 2d 602 and reproduced at App. 19a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 18, 2001. App. 2a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

INTRODUCTION

The *Noerr-Pennington* doctrine affords immunity from antitrust liability for activities in the course of petitioning the government for redress, including through litigation. In *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.* ("*PRE*"), 508 U.S. 49 (1993), this Court explained that *Noerr-Pennington* immunity does not extend to litigation that is a sham because it is objectively unreasonable. This Court, however, expressly left open the questions "whether, and, if so, to what extent, *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations." *Id.* at 61-62 n.6. This case presents those questions, which have divided the courts of appeals. In addition, this case presents another important question that has likewise divided the courts of appeals: whether a party that has no right to institute litigation, and

does not in fact do so, may nevertheless obtain the benefit of *Noerr-Pennington* immunity where that party has surreptitiously funded litigation on behalf of other parties.

The decision below has added to the conflict and confusion, which existed to some extent before *PRE*, among the Second, Third, Fifth, Sixth, Ninth, Eleventh, and District of Columbia Circuits as to the existence and scope of a fraud exception to *Noerr*. That conflict and confusion has been recognized by the courts themselves, *see, e.g.*, *Armstrong Surgical Ctr., Inc.* v. *Armstrong County Mem'l Hosp.*, 185 F.3d 154, 163 n.7 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 2716 (2000), by the commentators, *see infra* at 21, and by the Solicitor General, *see* Brief for the United States and the Federal Trade Commission as Amici Curiae at 15, *Armstrong Surgical Ctr.* (No. 99-905). The Fourth Circuit now joins that conflict in a case in which the respondents claim *Noerr-Pennington* immunity from antitrust liability for covertly funding and directing a state court lawsuit—activities they concealed from, and misrepresented to, the parties to the lawsuit and the state courts. The first question presented asks this Court to resolve the question expressly left open in *PRE* and resolve the circuit conflict over the existence and scope of a fraud exception to the *Noerr-Pennington* doctrine.

The second question presented asks this Court to resolve the conflict between the Fourth, Fifth, Sixth, and Ninth Circuits as to whether *Noerr-Pennington* immunity applies to a non-party who does not engage in petitioning through litigation but rather surreptitiously funds and directs litigation by others which the non-party could not itself bring. The Fourth Circuit, in accordance with the Sixth, held in this case that *Noerr-Pennington* immunity extends to such activity even if the non-party would not have standing to file suit and did not do so. The Fourth Circuit recognized that its decision conflicted with a decision of the Fifth Circuit, which held that *Noerr-Pennington* immunity does not extend to such activities when the non-party lacks independent standing to

bring suit on its own. *See* App. 12a. The Ninth Circuit has taken a different approach, holding that *Noerr-Pennington* immunity applies to such activities unless the non-party's fraud deprives the litigation of its legitimacy.

These questions are important and recurring. The time has come for the Court to grant certiorari to resolve the circuit conflicts they have generated.

STATEMENT OF THE CASE

1. The Respondents' Intentional Misrepresentations to and Fraud on the Litigants and the State Courts.[1] In 1991, Baltimore Scrap sought to install and operate a scrap metal shredder in Baltimore. The David J. Joseph Company ("Joseph Co.") possessed a monopoly over the market, as it operated the only scrap metal shredder in town. *See* App. 4a.[2] Shredding companies buy scrap metal, shred it, and sell the processed scrap to steel mills, foundries, and scrap metal brokers. Shredders operate on a narrow profit margin, and competition from another shredder squeezes that narrow margin by driving up the scrap metal price and driving down the price of processed scrap. *See* App. 25a.

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[1] This matter comes before the Court on respondents' successful motion for summary judgment below. Because "the case arrives after a grant of summary judgment to respondent[,]* * * we consider the facts in the light most favorable to petitioner." *Howlett* v. *Birkdale Shipping Co.*, 512 U.S. 92, 94 (1994); *see also Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 332 n.2 (1990) ("Because the case comes to us on review of summary judgment, inferences to be drawn from the underlying facts * * * must be viewed in the light most favorable to the party opposing the motion." (internal citations omitted)); *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962).

[2] The other respondents are the Baltimore manager of the Joseph Co. shredder; the prior owners of the Joseph Co. shredder, who retained a financial interest in the shredder; and individuals and other companies affiliated with the prior owners.

Baltimore Scrap's proposal required zoning approval from the City of Baltimore. A coalition of citizens groups "openly opposed the shredder on environmental grounds." App. 19a. The Joseph Co. also opposed the new shredder—but for different reasons. The Joseph Co. "did not welcome the competition" and "secretly set about to thwart [Baltimore Scrap's] zoning application." App. 20a. Prior to Baltimore Scrap filing the zoning application, the Joseph Co. "was seeking ways to prevent" Baltimore Scrap from becoming a competitor in the Baltimore market. App. 27a. To that end, the Joseph Co.'s Baltimore manager sent a memorandum to a company executive indicating that "[t]hrough connections of I.D. Shapiro [the prior owner of the shredder] and Warren Rich [an attorney representing the company], we are trying to block [Baltimore Scrap's] move to install a new shredder. * * * Warren is handling all of this so as to keep [the Joseph Co.'s] name out of the picture." App. 27a.

Baltimore Scrap filed its first zoning application in September 1991. Respondents and their attorneys contacted several city officials to voice their opposition to Baltimore Scrap's application. The Joseph Co. became concerned about the antitrust implications of these activities and consulted an attorney at the Washington, D.C. law firm Arnold & Porter. The attorney advised the Joseph Co. vice president that "legitimate petitioning of the government was protected by the *Noerr-Pennington* doctrine, but lying and deceit was not." App. 28a. The Baltimore Board of Zoning Appeals ("BMZA") held hearings on Baltimore Scrap's application. A number of individual citizens and citizens groups appeared and testified against the application; the Joseph Co. did not. The BMZA rejected Baltimore Scrap's application. *See* App. 4a, 28a-29a.

In 1992, Baltimore Scrap filed another application with the BMZA that had additional environmental safeguards. Many of the same citizens groups who had opposed the first permit application again testified in opposition. Apparently con-

vinced that the second application had sufficient environmental safeguards, the BMZA granted the permit. *See* App. 29a.

The Joseph Co. was not happy with this decision. I.D. Shapiro, the prior owner with a continuing financial interest, discussed with his attorneys the option of filing an appeal in the company's name. App. 30a. The group "was concerned, however, that an appeal by a competitor, especially one with a spotty environmental track record, would lack credibility." App. 30a. Instead, the group "struck upon the idea" of secretly funding an appeal by the citizens. App. 30a.

Respondents thereupon sought to find a lawyer to handle the appeal by the citizens groups straw parties. I.D. Shapiro first contacted Richard Berndt of the Baltimore law firm Gallagher, Evelius & Jones. *See* Ct. App. J.A. 5972-73, 3955. Shapiro told Berndt that he was interested in appealing the issuance of Baltimore Scrap's permit but that it was essential that he and the Joseph Co. remain "invisible." Ct. App. J.A. 6021-23, 3956. After reviewing the zoning board file on Baltimore Scrap's application, lawyers at the firm advised Shapiro that Baltimore Scrap's "presentation looked good" and that the only thing they could do was "delay" Baltimore Scrap in court by filing an appeal based on the fact that Baltimore Scrap's 1992 application was filed less than a year after its 1991 application. Ct. App. J.A. 6026-29, 3956. Because he wanted to remain "invisible," Shapiro told the lawyers to call an attorney for respondents for the names of the local citizens who would act as straw parties in the appeal. Ct. App. J.A. 6031-35. The next day, Berndt called I.D. Shapiro back and, without explanation, told him to find some other law firm to pursue the appeal. *See* Ct. App. J.A. 6030-31, 3956.

Respondents then turned to Baltimore lawyer David Irwin to file the appeal. *See* Ct. App. J.A. 5709-10. Irwin had no experience in zoning law and had never handled a zoning

appeal in his career. *See* Ct. App. J.A. 5733. Irwin agreed to take the case without reviewing the zoning board file. *See* Ct. App. J.A. 5708-10.

Now respondents needed to find citizens to prosecute the appeal. The respondents would fund the litigation only if they could do so surreptitiously—they wanted to remain "invisible." Ct. App. J.A. 6022-25; *see* App. 4a-5a, 30a. Thus, at respondents' behest, an official of one of Shapiro's affiliated companies, Marlen Trading, approached the president of one of the citizens groups, Gloria Sipes. Respondents chose Sipes because she had spoken in opposition to Baltimore Scrap's zoning application. *See* App. 30a. The Marlen official told Sipes that " 'local businesses' " wanted to fund an appeal and that if interested she should call attorney David Irwin. App. 30a. The official did not identify herself as a representative of Marlen Trading or reveal to Sipes that Marlen Trading was co-owned and controlled by I.D. Shapiro, who also held a financial interest in the Joseph Co. shredder. *See* Ct. App. J.A. 6094-96. Without the covert funding offer, the citizens groups and Sipes would not have had the financial resources to bring an appeal themselves. *See* App. 33a n.16; Ct. App. J.A. 2858. Moreover, evidence that must be credited at this stage of the proceedings confirms that they would have rejected the funding offer had they known the Joseph Co. was behind it. *See* App. 33a n.16.

On August 27, 1992, Irwin filed an appeal on behalf of the citizens groups in the Circuit Court for Baltimore City. The named appellants were three citizens groups; the names of Shapiro and the Joseph Co. did not appear on the papers. *See* App. 31a. On October 13, 1992, Irwin moved to add Gloria Sipes as an individual plaintiff. *See* App. 31a. Baltimore Scrap filed two procedural objections to the appeal. It moved to dismiss the appeal on the ground that the citizens groups lacked standing and opposed Sipes' Motion to Intervene as time-barred. *See* App. 31a. The circuit court denied Balti-

more Scrap's motions but ultimately found on the merits for Baltimore Scrap. *See* App. 31a, 35a.

Respondents were "closely involved" with the citizens' appeal. App. 33a. An attorney for Shapiro and Shapiro himself communicated with Irwin concerning strategies for the case. A member of the firm representing Shapiro forwarded copies of pleadings to Shapiro and noted that "Irwin 'is representing our interest.' " App. 33a. Irwin admitted that he sent most of the pleadings to Shapiro's firm and that the firm was a "resource" in the case. App. 33a. The district court noted that "[i]n contrast, Mr. Irwin did not submit these drafts to Ms. Sipes or the citizens groups for prior approval." App. 33a. Throughout the proceedings, respondents "continued to mask their involvement." App. 33a. Their names never appeared on court papers. The citizens groups were not told who was funding the appeal. Neither the citizens groups nor Sipes were told that Shapiro and his personal attorneys were vetting the pleadings and suggesting strategies. App. 33a-34a.

By pure happenstance, respondents' "cloak of secrecy" began to unravel in March 1993. App. 35a. The Baltimore manager of the Joseph Co., David Workum, intended to fax a copy of a draft motion to stay the circuit court's ruling to one of the attorneys for the company. Workum had obtained the draft from a Shapiro attorney, who had in turn received it from Irwin. *See* App. 36a. The fax was mistakenly sent to a third party, Harry Lenick. Upon receiving the "errant fax," Lenick forwarded it to the president of Baltimore Scrap. App. 35a-36a.

The next day, Irwin, on behalf of the citizens groups, moved to stay the circuit court's ruling. In opposition, Baltimore Scrap drew the court's attention to the "errant fax" and argued that the citizens groups were only acting as "surrogates" for the real parties in interest, the Joseph Co. and persons affiliated with it. App. 36a. In a reply brief,

Irwin stated: " '[Joseph Co.] is not, openly or under the table, the real party in interest in this case, and has in no way enlisted Appellants to serve as [the Joseph Co.'s] stalking horse to prosecute the appeal of the Board's decision.' " App. 36a. The circuit court denied the motion to stay and noted that it perceived the "hand of the [respondents]" in the appeal and that respondents had "gone from the role of an interested observer to the role of an active participant." App. 37a-38a (internal citations omitted).

Shortly after the transmission of the errant fax, the Joseph Co. again contacted its antitrust counsel at Arnold & Porter, Richard Wertheimer. *See* Ct. App. J.A. 6203-10, 4292. Wertheimer told another lawyer for respondents, Sam Wood, that "Irwin has an ethical obligation to disclose to Sipes the identity of the party who is paying his legal bills in this matter." Ct. App. J.A. 4169. Wood told Wertheimer that "Irwin is not inclined to disclose this information." Ct. App. J.A. 4169. Wertheimer urged Wood "to check the Rules of Professional Responsibility and suggest to Irwin that he make accurate disclosure." Ct. App. J.A. 4169. Wertheimer also advised respondents not to appeal the circuit court's ruling to the Court of Special Appeals:

> Wertheimer[] * * * wouldn't be sorry to see us drop the issue. The covert nature of our involvement through Marlin [sic] Trading is not typical [Joseph Co.] style and, he believes, not becoming of our position in the industry. We are just too big and this kind of behind-the-scenes activity could easily become an embarrassment.
>
> * * *
>
> Wertheimer realizes we must make our decision based on commercial issues and that much is at stake. If we must oppose the shredder, he'd rather we do it in the open—although he would really like to see us withdraw now, before Simon [the president of Baltimore Scrap] incurs any real economic injury. [Ct. App. J.A. 4303.]

Respondents ignored Wertheimer's advice and told Irwin to file an appeal to the Court of Special Appeals. *See* Ct. App. J.A. 1762-63. Irwin filed the Notice of Appeal before even consulting with the citizens groups to obtain approval to proceed in their names. *See* Ct. App. J.A. 1762-63, 5742-57.

In early April 1993, Irwin met with the citizens groups and Sipes and informed them of the involvement of respondents in funding the appeal. At least some of the groups' leaders were "upset" and "disappointed" about the identity of their covert benefactors. App. 37a. Sipes testified at her deposition that she would never have participated in the appeal had she known that the Joseph Co. was paying Irwin's fees: "Number one, like I said before, if I'd known United Iron & Metal [the Joseph Co.] was involved, I would never have accepted the check or even the offer." Ct. App. J.A. 6151. At her deposition, Sipes also testified that prior to Irwin's disclosure she had no idea that the Joseph Co. was involved in her appeal: "[W]e were all very surprised because we never dreamed that [the Joseph Co.] * * * was involved. * * * I was naïve enough to think that it was just what she [the Marlen Trading official] said, people in our area, you know, businesses in our area." Ct. App. J.A. 6117.

The citizens groups and Sipes ultimately decided to press on with the appeal. App. 37a. In January 1994—sixteen months after the zoning lawsuit was filed—the Maryland Court of Special Appeals held that the case was " 'dead on arrival in circuit court' " because the citizens groups lacked standing and the motion to intervene by Sipes was time-barred. App. 38a (quoting opinion of the Court of Special Appeals). The court remanded with orders to dismiss.

2. District Court Proceedings. In 1996, Baltimore Scrap filed a complaint against the Joseph Co. and the other respondents. The complaint alleged the following counts: (1) antitrust violations of Section 1 of the Sherman Act; (2) violations of Maryland antitrust law; (3) malicious use of

process; (4) abuse of process; (5) tortious interference with prospective advantage; (6) fraud; and (7) conspiracy. *See* App. 39a. Following discovery, respondents moved for summary judgment, and the district court granted that motion on the basis of *Noerr-Pennington* immunity. *See* App. 39a, 57a.

Although the district court found respondents' actions "deceitful[,]" "underhanded[,]" "unseemly," and "morally wrong," it concluded that those actions were protected by *Noerr-Pennington*. App. 21a, 50a. The district court held that under *Noerr-Pennington*, "[a]bsent aggravating 'plus factors,' a party, even with anti-competitive intent, may provide clandestine support for litigation instigated by another party without incurring liability." App. 41a. Baltimore Scrap argued that respondents' actions fell within two exceptions to *Noerr-Pennington* immunity—sham litigation and litigation based on fraud.

The district court applied the *PRE* two-part test for sham litigation, rejecting Baltimore Scrap's arguments that the state court litigation was objectively baseless. *See* App. 42a. On the fraud issue, the district court first reasoned that this Court has noted that " '[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.' " App. 47a-48a (quoting *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 512 (1972)). The district court then noted that the "*PRE* Court took pains to leave open whether *Noerr* permits imposition of antitrust liability due to fraud, absent sham litigation" and that "[s]ubsequent to *PRE*, lower courts have grappled with the meaning of the fraud exception." App. 48a-49a.

The district court found most persuasive the Ninth Circuit's analysis of the fraud issue. It noted that the Ninth Circuit had read *PRE*'s footnote six to mean that "a defendant's fraudulent behavior will strip it of *Noerr* immunity if there is 'deceptive conduct which goes to the core of a lawsuit's

legitimacy.' " App. 49a (quoting *Liberty Lake Invs., Inc.* v. *Magnuson*, 12 F.3d 155, 158 (9th Cir. 1993), *cert. denied*, 513 U.S. 818 (1994)). Baltimore Scrap argued that respondents' actions constituted fraud on the state courts, the citizens groups, the plaintiffs, and the BMZA. *See* App. 50a-55a. The district court held, however, that respondents' actions "did not rise to the level of fraud necessary to vitiate *Noerr* immunity." App. 50a.[3]

3. The Court of Appeals Decision. Baltimore Scrap appealed to the Fourth Circuit, arguing that the *Noerr-Pennington* doctrine did not apply to this case because that doctrine protects litigants but not third parties who covertly fund and direct a lawsuit and, alternatively, that the fraud and sham litigation exceptions operated to strip respondents of any *Noerr-Pennington* immunity. *See* App. 9a, 11a.

The Fourth Circuit rejected Baltimore Scrap's argument that *Noerr-Pennington* applies only to litigants, not third parties who covertly fund the litigation and do not themselves petition the courts. *See* App. 11a. The Court recognized that its decision conflicted with the Fifth Circuit's decision in *In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988), which held that *Noerr-Pennington* did not apply to those who lacked independent standing to sue but instead covertly encouraged and assisted the lawsuits of others. *See* App. 12a. The Fourth Circuit found that it did not need to decide whether respondents had independent standing to pursue the zoning litigation "because the standing of third parties does not control the sham litigation analysis." App. 12a-13a.

On the issue of a fraud exception, the Fourth Circuit began its analysis by noting that, in *PRE*, this Court had "specifically left open the question of whether a fraud exception to

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[3] The district court also held that *Noerr-Pennington* immunity protected respondents' actions from the state antitrust and common law claims. *See* App. 56a-57a.

Noerr-Pennington exists." App. 14a. It then found that "[i]f a fraud exception to *Noerr Pennington* does exist, it extends only to the type of fraud that deprives litigation of its legitimacy." App. 14a. The court relied on opinions from the Third and Ninth Circuits. *See* App. 14a (citing *Cheminor Drugs, Ltd.* v. *Ethyl Corp.*, 168 F.3d 119 (3d Cir.), *cert. denied*, 528 U.S. 871 (1999); *Liberty Lake*, 12 F.3d at 158-159). The Fourth Circuit held that respondents' actions were not within the scope of the fraud exception to *Noerr-Pennington*, assuming one existed, because Baltimore Scrap could not show that the state court judgment was procured by fraud or deceit to bring it within this understanding of the scope of any fraud exception. App. 14a.[4]

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD RESOLVE THE CIRCUIT CONFLICT AND CONFUSION OVER THE EXISTENCE AND SCOPE OF A FRAUD EXCEPTION TO *NOERR-PENNINGTON* IMMUNITY

The petition should be granted because it involves an important question of federal law expressly left open by this Court: "whether and, if so, to what extent, *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations." *PRE*, 508 U.S. at 61-62 n.6. This important question has divided the courts of appeals, and the Fourth Circuit's decision directly conflicts with the decisions of other circuit courts. *See* S. Ct. Rule 10(a). The Court should not allow this conflict and confusion to persist.

The *Noerr-Pennington* doctrine protects those who exercise their First Amendment right to petition the government for a redress of grievances from suit under the antitrust laws. *See California Motor Transp.*, 404 U.S. at 510; *United Mine Workers of Am.* v. *Pennington*, 381 U.S. 657, 669 (1965);

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[4] The court also found that the sham exception to *Noerr-Pennington* did not apply in this case. *See* App. 9a-11a.

Eastern R.R. Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961). This immunity from suit, however, is not absolute. The doctrine does not protect petitioning activities that are " 'a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and [where] the application of the Sherman Act would be justified.' " *California Motor Transport*, 404 U.S. at 511 (quoting *Noerr*, 365 U.S. at 144).

After a long period in which the courts of appeals struggled to define the sham exception, the *PRE* Court enunciated a two-part definition of sham litigation. That definition asks whether a lawsuit is objectively baseless and, if so, whether the litigation was undertaken to interfere directly with the business relationships of a competitor. *See PRE*, 508 U.S. at 60-61.[5]

After defining the sham exception, the *PRE* Court expressly left open the question of the existence and scope of a fraud exception to *Noerr-Pennington* immunity:

> In surveying the "forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations," we have noted that "unethical conduct in the setting of the adjudicatory process often results in sanctions" and that "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *California Motor Transport*, 404 U.S., at 512-513 * * *. *We need not decide here whether and, if so, to what extent,* Noerr *permits the imposition of antitrust liability for*

[5] If a plaintiff defeats a defendant's claim of *Noerr-Pennington* immunity by demonstrating first the objective and then the subjective components of a sham, the plaintiff must still prove a substantive antitrust violation. *See PRE*, 404 U.S. at 61 ("Proof of a sham merely deprives the defendant of immunity; it does not relieve the plaintiff of the obligation to establish all other elements of his claim."). The same would be true of any fraud exception.

> *a litigant's fraud or other misrepresentations.* [508 U.S. at 61-62 n.6 (emphasis added; citation omitted).]

That remaining question is the one presented here. It has generated confusion and conflict in the circuit courts.

In his amicus brief in response to this Court's invitation in *Armstrong Surgical Center*, the Solicitor General noted that this Court's opinions prior to *PRE* provided some support for answering the open question in *PRE* in favor of a fraud exception to *Noerr-Pennington* immunity.[6] *See* Brief for the United States and the Federal Trade Commission as Amici Curiae at 11-12 (finding support in this Court's opinions for the contention that "the Sherman Act should reach the conduct of defendants who restrain competition by conspiring to 'corrupt administrative or adjudicative proceedings * * * by making deliberate misrepresentations * * * for the purpose of poisoning the outcome of the proceedings' ").

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[6] Commentators have also found support in this Court's jurisprudence for a fraud exception to *Noerr-Pennington* immunity. *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶¶ 203e, 205c2, at 169, 230-232 (2d ed. 2000); Robert H. Bork, *The Antitrust Paradox* 358-359 (1978) ("Access to judicial and administrative processes may be a constitutional right, but there is no constitutional right to make deliberate misrepresentations to such tribunals * * * for the ultimate purpose of wreaking economic injury upon a competitor."); Scott Filmore, Comment, *Defining the Misrepresentation Exception to the* Noerr-Pennington *Doctrine*, 49 U. Kan. L. Rev. 423, 424 (2001) ("[W]hile misrepresentations to the government probably would have fallen into the sham exception before *Professional Real Estate Investors*, this decision left the validity of such conduct in an uncertain state."); Gary Myers, *Antitrust and First Amendment Implications of* Professional Real Estate Investors, 51 Wash. & Lee L. Rev. 1199, 1229-30 (1994) ("Fraud or misrepresentations committed during or in connection with litigation should be treated under a separate analysis. * * * [I]f an antitrust plaintiff has a factual basis for asserting that misrepresentations were used as part of a predatory litigation strategy, the plaintiff may be able to avoid application of the two-part sham test announced in *Professional Real Estate Investors*.").

As noted by the Solicitor General, *see id.*, many of this Court's decisions support a fraud exception, particularly for misrepresentations made during litigation. For example, in *California Motor Transport*, the Court observed that there are "forms of illegal and reprehensible practice," including "[m]isrepresentations," that may "corrupt the administrative or judicial processes" and "result in antitrust violations." 404 U.S. at 513; *see also id.* at 517 (Stewart, J., concurring in the judgment) (distinction between legislative and administrative or judicial body "might make a difference in the applicability of the antitrust laws if the petitioners made misrepresentations of fact or law to these tribunals, or had engaged in perjury, or fraud, or bribery"). Likewise, in *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 504 (1988), the Court noted that "[a] misrepresentation to a court would not necessarily be entitled to the same antitrust immunity allowed deceptive practices in the political arena * * *." Finally, both *PRE* and *California Motor Transport* cited this Court's decision in *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 177-178 (1965), which held that proof that a patent-holder "obtained the patent by knowingly and willfully misrepresenting facts to the Patent Office * * * would be sufficient to strip [the holder] of its exemption from the antitrust laws" for any "injurious consequences * * * of the patent's enforcement."

While recognizing this precedent favoring a fraud exception to *Noerr-Pennington* immunity, the courts of appeals have struggled with its existence because of the lack of a definitive statement by this Court. This confusion over the existence of a fraud exception has caused conflict among the courts of appeals as to the scope and definition of such an exception. The Fifth, Eleventh, and D.C. Circuits have found a fraud exception to *Noerr-Pennington* immunity for misrepresentations made during the adjudicatory process. The Fourth and Ninth Circuits will apply a fraud exception only if

the fraud on the court deprives the litigation of its legitimacy. The Second and Sixth Circuits have held that unethical conduct within the adjudicatory process should be analyzed under the sham exception to *Noerr*. The Third Circuit is internally divided on the existence and scope of a fraud exception, with two separate panels issuing conflicting rulings within four months of each other.

1. Three circuits have found a freestanding exception to the *Noerr-Pennington* doctrine that applies generally to fraudulent conduct in connection with litigation or other government proceedings. In *Woods Exploration & Producing Co.* v. *Aluminum Co. of Am.*, 438 F.2d 1286, 1298 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), the Fifth Circuit held that *Noerr* did not protect the filing of false production forecasts with a state regulatory commission. As the court concluded, such "abuse of the administrative process" does not "justify antitrust immunity." *Id.*

The Eleventh Circuit similarly found *Noerr-Pennington* immunity inapplicable when misrepresentations were made to a governmental agency acting in an adjudicative capacity. *See St. Joseph's Hosp., Inc.* v. *Hosp. Corp. of Am.*, 795 F.2d 948, 955 (11th Cir. 1986). The Court held that "[m]isrepresentations under these circumstances do not enjoy *Noerr* immunity," and that "the furnishing of misinformation" to an adjudicative body is "not entitled to the same protection" as legitimate litigation tactics. *Id.*

The D.C. Circuit likewise has found *Noerr-Pennington* inapplicable to situations involving misrepresentations in the adjudicatory process. *See Whelan* v. *Abell*, 48 F.3d 1247, 1255 (D.C. Cir. 1995) (analyzing *Noerr* in the context of a tort case claiming abuse of process and malicious prosecution). The court found that "[h]owever broad the First Amendment right to petition may be, it cannot be stretched to cover petitions based on known falsehoods." *Id.* The court then cited *California Motor Transport*, *PRE*, and the Ninth

Circuit's decision in *Liberty Lake* for the proposition that the two-part sham test is inapplicable when there is knowing fraud or intentional misrepresentation. *See id.*

2. The Fourth Circuit, in the case at bar, took a different approach. It held that if a separate fraud exception to *Noerr* does exist, it "extends only to the type of fraud that deprives litigation of its legitimacy." App. 14a. In the Fourth Circuit, if a "judgment is not procured by fraud or deceit, it cannot fall within any fraud exception to *Noerr-Pennington*." App. 14a.

The Fourth Circuit relied on decisions from the Third and Ninth Circuits to support its understanding of the scope of the fraud exception. *See* App. 14a (quoting *Cheminor Drugs*, 168 F.3d at 123-124; *Liberty Lake*, 12 F.3d at 158-159). The Third Circuit position—discussed below—is in fact unsettled. *See infra* at 19-20. The Ninth Circuit has held that "in the context of a judicial proceeding, if the alleged anticompetitive behavior consists of making intentional misrepresentations to the court, litigation can be deemed a sham if 'a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy.' " *Kottle* v. *Northwest Kidney Ctrs.*, 146 F.3d 1056, 1060 (9th Cir. 1998), *cert. denied*, 525 U.S. 1140 (1999) (quoting *Liberty Lake*, 12 F.3d at 158 and citing *Clipper Exxpress* v. *Rocky Mtn. Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1260 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983)). In the Ninth Circuit, fraud and misrepresentation constitute a separate "categor[y]" of the sham exception—if a court finds such fraud, the two-part *PRE* sham litigation test does not apply. *Id.* at 1061.[7]

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[7] Thus, the law of the Ninth Circuit (akin to the approach of the Second and Sixth Circuits discussed below) views fraud in a judicial proceeding in the context of the sham litigation exception to *Noerr-Pennington* immunity. *See Kottle*, 146 F.3d at 1060. Unlike other circuits, however, the Ninth Circuit has developed a separate test for such claims.

3. Other circuits apply still another test, considering claims of fraud under the general test for sham litigation. The Second Circuit, interpreting *California Motor Transport*, has held that " 'unethical conduct in the setting of the adjudicatory process' " falls within the sham exception to *Noerr-Pennington*. *Landmarks Holdings Corp.* v. *Bermant*, 664 F.2d 891, 896 (2d Cir. 1981) (quoting *California Motor Transp.*, 404 U.S. at 512); *see Juster Assocs.* v. *City of Rutland*, 901 F.2d 266, 271 (2d Cir. 1990) (citing with approval *Landmarks Holdings*). The court held that *California Motor Transport* "expanded" the sham exception, stating that "unethical conduct in the setting of the adjudicatory process" cannot "seek refuge under the *Noerr-Pennington* doctrine since [it] constitute[s] an abuse of process effectively barring * * * access to the agencies and courts." *Landmarks Holdings*, 664 F.2d at 896. In the Second Circuit, the "abuse of the administrative and judicial process through unethical lawyer conduct * * * is unprotected by the *Noerr-Pennington* immunity." *Id.*

The Sixth Circuit has also interpreted *California Motor Transport* as holding that "unethical conduct in the setting of the adjudicatory process" falls within the sham exception to *Noerr-Pennington* because "such conduct constitutes an abuse of [governmental] process * * * effectively barring a competitor's meaningful access to the courts or agencies." *Potters Med. Ctr.* v. *City Hosp. Ass'n*, 800 F.2d 568, 578 (6th Cir. 1986). The Sixth Circuit held that "knowingly false submissions or intentional misrepresentations constitute an abuse of government process, analogous to the antitrust violation that occurs when one procures a patent through fraud on the patent office." *Id.* at 580.

4. The law of the Third Circuit is even more muddled. That Circuit in two separate 1999 cases came to different conclusions as to the existence and scope of a fraud exception. *See Armstrong Surgical Ctr.*, 185 F.3d at 160; *id.* at 164 (Schwartz, J., dissenting) (noting the conflict between

the two panels on the fraud exception issue); *Cheminor Drugs*, 168 F.3d at 123. In *Cheminor Drugs*, the Third Circuit first noted that *PRE* left open the fraud exception question and then held that misrepresentations that "infect the core" of the defendant's claim and the government's resulting actions are not entitled to *Noerr-Pennington* immunity under the objectively baseless prong of the sham exception outlined in *PRE*. *See Cheminor Drugs*, 168 F.3d at 123-124; *accord Armstrong Surgical Ctr.*, 185 F.3d at 170-171 (Schwartz, J., dissenting) (adopting this interpretation of *Cheminor*).

Four months later, another Third Circuit panel appeared to reverse *Cheminor*'s definition of a fraud exception. In *Armstrong*, the majority acknowledged this Court's suggestion of a fraud exception in *California Motor Transport*, but concluded that "injuries that are inflicted by states acting as regulators" do not give rise to liability under the Sherman Act "even where it is alleged that a private party urging the action did so by bribery, deceit or other wrongful conduct that may have affected the decision making process." *Armstrong Surgical Ctr.*, 185 F.3d at 162.[8] Thus, at the present time, the Third Circuit is itself internally divided as to the existence and scope of a fraud exception.

5. The above discussion of the circuit courts' approaches to the fraud exception issue evidences the confusion

[8] In fashioning its holding, the majority in *Armstrong* relied heavily on this Court's decision in *City of Columbia* v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365, 368 (1991), a case involving lobbying for the passage of zoning ordinances. *Omni*'s statements on the relevance of deception to *Noerr* immunity arose in the legislative context and thus are inapplicable to a fraud exception in the context of litigation. *See Armstrong Surgical Ctr.*, 185 F.3d at 167 (Schwartz, J. dissenting); Areeda & Hovenkamp, *supra*, ¶ 205c2, at 230-231 ("We would therefore disagree with the Third Circuit's analysis in *Armstrong*, which dealt with a claim of false information submitted in an essentially adjudicatory setting as if it were no different from false information submitted in a legislative setting.").

and conflict over its existence and scope. Some circuits have recognized a separate fraud exception to *Noerr-Pennington* immunity in the litigation context (or considered *Noerr* inapplicable to misrepresentations). Some circuits have treated misrepresentations as falling within the sham exception, thereby possibly subjecting them to the two-part sham litigation test. In addition, the circuits have divided over the level and materiality of fraud or misrepresentation required.

The Third Circuit, in analyzing the existence and scope of a fraud exception, has noted on multiple occasions the conflicts among the circuits. *See Armstrong Surgical Ctr.*, 185 F.3d at 163 n.7 (acknowledging conflict between the Third Circuit's approach and that of the Sixth, Ninth, and Eleventh Circuits); *Cheminor Drugs*, 168 F.3d at 131 (Sloviter, J., dissenting) (finding conflict between Third Circuit's approach and that of the Ninth and D.C. Circuits). The Solicitor General also has found tension between the circuits as to reasoning and result. *See* Brief for the United States and the Federal Trade Commission as Amici Curiae at 14-15, *Armstrong Surgical Ctr.* (No. 99-905).

Moreover, commentators discussing the existence and scope of a fraud exception have noted the conflict among the circuits and the need for clarification from this Court. *See* Filmore, *supra*, at 425 ("Each federal appellate court that has addressed a misrepresentation exception claim has developed a different approach."); *id.* at 456 ("The Supreme Court has never directly addressed the exception and, after the Court decided *Professional Real Estate Investors*, the circuit courts have taken conflicting approaches on the issue."); Paul Gowder, *Antitrust: Third Circuit Rejects Exception to* Noerr-Pennington *Doctrine Creating Split Among Circuits*, 27 J.L. Med. & Ethics 278, 279 (1999) ("In rejecting the exception of misrepresentation to administrative agencies, *Armstrong* creates a split among the circuits. Until the U.S. Supreme Court resolves whether the exception to the doctrine is valid, the doctrine will be interpreted inconsistently throughout the

United States."); Myers, *supra*, at 1229, 1234 ("Although the Court in *Professional Real Estate Investors* announced a two-part test for litigation behavior generally, it expressly did not deal with situations involving litigation fraud or other unethical conduct. * * * [T]he contours of the fraud exception to *Noerr-Pennington* remain unclear.").

This confusion and conflict in the law is intolerable and should be resolved by this Court. In this case, respondents both misrepresented to the state court their role as masterminds of the zoning litigation and concealed that role from the court and the plaintiffs. Yet despite conduct the trial court found "deceitful" and "morally wrong," the Fourth Circuit (following the Ninth) held that respondents enjoyed absolute antitrust immunity because their fraud, in the court's view, did not deprive the litigation of its legitimacy. The court so held even though the record reveals that but for the fraud, the litigation would not have occurred at all—members of the citizens groups could not fund the appeal themselves and they did not want their claims controlled by a company engaging in the very activities they sought to stop. *See supra* at 7, 10.[9] By contrast, the Fifth, Eleventh, and D.C. Circuits recognize a freestanding fraud exception that does not contain the Fourth Circuit's limiting requirement, and the Second and Sixth Circuits analyze such claims under a sham litigation test. And the Third Circuit, at least in its most recent decision, recognizes no fraud exception at all. The Court should not allow this conflict to persist further. *See* S. Ct. Rule 10(a); *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals").

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[9] Over the years, community and environmental groups had "lodged repeated complaints about excessive noise and pollution" created by the Joseph Co. shredder. App. 26a.

II. THE COURT SHOULD RESOLVE THE CIRCUIT CONFLICT AND CONFUSION OVER WHETHER *NOERR-PENNINGTON* IMMUNITY APPLIES TO NON-PARTIES WHO COVERTLY FUND AND DIRECT LITIGATION THEY COULD NOT BRING THEMSELVES

This case presents a second issue on which the lower courts also need guidance: whether *Noerr-Pennington* immunity applies to non-parties, who do not themselves have standing to file a lawsuit, but who covertly fund and direct litigation by others. The courts of appeals are divided on this question of law. In this case, respondents covertly financed and directed the state zoning litigation in the name of the plaintiff citizens groups. *See* App. 20a. Neither the citizens groups plaintiffs nor the state courts knew of the involvement of respondents—direct competitors of Baltimore Scrap who vehemently opposed the construction of a new metal shredder in the area. *See* App. 31a. The Fourth and Sixth Circuits are largely in agreement that *Noerr* protects this type of activity. They are in direct conflict with the Fifth Circuit, which has held that *Noerr* does not apply when the covert actors do not have standing to file suit themselves. All three circuits are in conflict with the Ninth Circuit, which has taken a position between that of the Fourth and Sixth, on the one hand, and the Fifth, on the other.

The Fourth Circuit held that *Noerr-Pennington* immunity protected respondents' covert activity. *See* App. 11a. The court found that the "standing of third parties does not control the sham litigation analysis" because "[f]unding of litigation by a non-party can be petitioning to the same extent that filing a lawsuit itself is petitioning." App. 12a-13a.[10] In

[10] The District Court found that, as a taxpayer, the Joseph Co. would have had standing to appeal the BMZA decision to the Circuit Court for Baltimore City. *See* App. 30a. *But see Committee for Responsible Dev. on 25th Street* v. *Mayor & City Council of Baltimore*, 767 A.2d 906 (Md. Ct. Spec. App. 2001) (holding that status as a taxpayer does not confer standing to appeal a zoning board decision but rather person must be "aggrieved by Board's

reaching this holding, the court noted that it would not rely on the Fifth Circuit's approach to the issue. *See* App. 12a. The Sixth Circuit has similarly held that *Noerr-Pennington* protects covert funding of and involvement in a lawsuit absent a showing of abuse of process or the "repetitive, harassing filing of meritless claims." *See City of Cleveland* v. *Cleveland Elec. Illuminating Co.*, 734 F.2d 1157, 1161-63 (6th Cir.), *cert. denied*, 469 U.S. 884 (1984).

In so holding, the Fourth and Sixth Circuits are in direct conflict with the Fifth. *In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988), like the case at bar, involved a non-party—Union Pacific—which did not seek to join the litigation directly but rather covertly provided legal assistance to one of the named parties. Most of the named parties and the district court itself were unaware of Union Pacific's assistance. *See id.* at 530-531. The Fifth Circuit held that "it would be an unwarranted extension of *Noerr-Pennington*'s protection to hold that a party without an interest in a case sufficient to allow it to directly petition the courts may nonetheless indirectly seek its anticompetitive goals through encouraging and assisting the lawsuits of others." *Id.* at 531. As the court noted, because "a person whose interest in a controversy is not sufficient to confer standing has no right to petition the court as a party and obtain relief," such a person "cannot reasonably claim that his participation in a lawsuit in which he has no standing is a genuine attempt to influence governmental decision-making." *Id.* at 530. As the court held, the same is neces-

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decision"); *Eastern Serv. Ctrs., Inc.* v. *Cloverland Farms Dairy, Inc.*, 744 A.2d 63, 67 (Md. Ct. Spec. App. 2000) ("In Maryland, a person whose sole reason for appealing a decision from the Zoning Board is to prevent competition with his established business does not have standing."). The Fourth Circuit stated that it did not need to decide whether respondents would have had standing to appeal the BMZA's zoning decision, "because the standing of third parties does not control the sham litigation analysis." App. 12a-13a.

sarily true when non-parties surreptitiously control litigation they could not bring on their own behalf. *See id.* at 530-531. Thus, in the Fifth Circuit, third parties without independent standing do not enjoy *Noerr-Pennington* protection for the types of activities undertaken by the respondents in this case.

The Ninth Circuit's position on this issue lies between the positions of the Fourth and Sixth Circuits, on the one hand, and the Fifth Circuit, on the other. *Liberty Lake* involved a non-party's prompting and financing of a lawsuit by concerned local businesses and individuals in order to fight a zoning permit issued to a potential competitor. *See Liberty Lake*, 12 F.3d at 156, 159. The court read *PRE*'s footnote six to require application of the two-part sham litigation test to such activity in the "absence of proof that a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy." *Id.* at 159. Because *Liberty Lake* did not involve either the covert funding and direction of the litigation or the misrepresentations or fraud that pervaded the case at bar, the court applied the two-part sham litigation test. *See id.* at 157-159.

While the Fifth Circuit has held that *Noerr* is inapplicable where the non-party does not have standing and the Fourth and Sixth Circuits have held that *Noerr* is applicable regardless of standing, the Ninth Circuit has found *Noerr* applicable (and will apply the sham litigation test) only in the absence of proof of intentional misrepresentation or knowing fraud. There is a direct conflict among the circuits as to the applicability in the litigation context of *Noerr-Pennington* to non-parties without independent standing who instead covertly fund and direct litigation. Some circuits, like the court below, permit such non-parties to gain the benefit of the immunity bestowed by *Noerr-Pennington* for petitioning activities even though those non-parties could not, and did not, actually petition the courts, while the Fifth Circuit has held to the contrary. The application of the antitrust laws should not continue to depend on the happenstance of where

a case arises, and the Court should therefore grant certiorari to resolve the conflict on this important, recurring issue.

III. THIS CASE INVOLVES TWO RECURRING QUESTIONS OF NATIONAL IMPORTANCE

The conflicts among the circuit courts on the two questions presented in this petition provide an important basis for this Court's review, but the need for certiorari is heightened by the important, recurring issues of national importance implicated by those questions. The covert funding and direction of litigation—and the accompanying fraud upon the court and the parties—threatens to corrupt *Noerr-Pennington* immunity and undermine the sham exception to *Noerr*.

The *Noerr-Pennington* doctrine provides immunity from antitrust liability for petitioning activities, but this immunity is far from absolute.[11] Just as sham litigation does not warrant antitrust immunity because it is "actually nothing more than an attempt to interfere directly with the business relationships of a competitor," litigation based upon fraud also corrupts the right to petition for anti-competitive gain. *Noerr*, 365 U.S. at 144. Thus, "[i]ntentional fraud on state courts or administrative tribunals can lay only a modest claim to the mantle of immunity that *Noerr* and its progeny cast around more legitimate, or more clearly political, 'petitioning' conduct." Brief of Solicitor General at 19; *accord Armstrong Surgical Ctr.*, 185 F.3d at 167-168 (Schwartz, J., dissenting) ("[T]he Supreme Court has broadly hinted *Noerr-Pennington* immunity is not intended to shield petitioning activities that do not further, but rather distort, the decision-

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[11] *See PRE*, 508 U.S. at 56 (noting lack of immunity for sham petitioning); *McDonald* v. *Smith*, 472 U.S. 479, 484 (1985) ("Nor do the Court's decisions interpreting the Petition Clause in contexts other than defamation indicate that the right to petition is absolute."); Areeda & Hovenkamp, *supra*, ¶ 201a, at 146; Bork, *supra*, at 351 ("The *Noerr* case, however, did not say or imply that any attempt to get any government official to do anything was beyond the reach of the Sherman Act or other legal sanctions.").

making process in the non-legislative context."); Bork, *supra*, at 347 ("Predation by abuse of governmental procedures, including administrative and judicial processes, presents an increasingly dangerous threat to competition."); James D. Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of* Noerr, 74 Geo. L.J. 65, 109 (1985) ("Willful misrepresentation purposefully distorts the process it invokes."); *cf. McDonald*, 472 U.S. at 484 ("[W]e are not prepared to conclude, 140 years later, that the Framers of the First Amendment understood the right to petition to include an unqualified right to express damaging falsehoods in exercise of that right.").

Misrepresentations and fraud are dangerous to the adjudicative process because of the reliance of courts on information provided by the parties:

> [T]he adjudicatory sphere is much different from the political sphere. There is an emphasis on debate in the political sphere, which could accommodate false statements and reveal their falsity. In the adjudicatory sphere, however, information supplied by the parties is relied on as accurate for decision making and dispute resolving. *The supplying of fraudulent information thus threatens the fair and impartial functioning of these agencies and does not deserve immunity from the antitrust laws.* [*Clipper Exxpress*, 690 F.2d at 1261 (emphasis added).]

Courts do not have the time and resources to conduct independent investigations. *See id.* at 1262. The circuit court conflict over the existence and scope of a fraud exception to *Noerr* should be resolved by this Court, because fraud and misrepresentation in litigation threaten the integrity and impartiality of the courts.

Moreover, covert funding and direction of litigation by non-parties who do not have standing not only undermines the constitutional and prudential requirements of standing, but also extends *Noerr-Pennington*'s limited immunity for

legitimate petitioning activities to those who cannot, and do not, engage in such activities. *See FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 231 (1990) ("The federal courts are under an independent obligation to examine their own jurisdiction, and 'standing is perhaps the most important of the jurisdictional doctrines.' ") (quoting *Allen* v. *Wright*, 468 U.S. 737, 750 (1984)). The Fourth Circuit in the instant case, in conflict with other circuits, found that non-parties who do not have standing to litigate cases can effectively function as rightful parties to the litigation. The court did so under the mantle of the right to petition, yet respondents in this case could not lawfully petition the courts in this matter. As applied to litigation, the *Noerr-Pennington* doctrine is a limited immunity from antitrust liability necessary to protect the right of parties to petition the courts for relief; it should not be turned into a sword that permits parties who have no right to petition the courts to engage in anticompetitive activities with impunity. The Fourth Circuit's holding is a corruption of both *Noerr-Pennington* and the standing requirement, and the circuit court conflict on this important issue should not be allowed to stand.

While fraudulent litigation corrupts *Noerr-Pennington* immunity, it also threatens the sham exception to *Noerr*. As a result of much confusion and conflict in the lower courts, *PRE* sought to clarify the definition of sham litigation. *See PRE*, 508 U.S. at 51, 55. The denial of a fraud exception or the analysis of fraud under the sham litigation exception puts at risk the precise sham definition set forth in *PRE*. Although particular litigation may without fraud be objectively baseless, a party's misrepresentations to the court may provide an objective basis for making the claim. *See* Filmore, *supra*, at 445-446. Moreover, under *PRE*, a winning lawsuit is never a sham. *See PRE*, 508 U.S. at 60 n.5 ("A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham."). But fraud might turn a losing lawsuit into a winning lawsuit, thereby

providing antitrust immunity under *PRE*. *See Cheminor Drugs*, 168 F.3d at 131 (Sloviter, J., dissenting); Filmore, *supra*, at 446. That is what happened here, where respondents' deceit permitted them to finance and control a lawsuit which would not have been financed at all had respondents revealed the truth. Fraud is eroding the efforts in *PRE* to clarify and unify the definition of sham litigation.

A definitive statement from this Court will also clarify for attorneys what constitutes lawful representation of clients in these and similar circumstances. The case at bar implicates the professional and ethical liability of attorneys. The district court and the Fourth Circuit suggested that the attorney who represented the plaintiffs in the state zoning litigation (and who accepted the covert funds and direction of respondents in this case) may have violated multiple provisions of the state rules of civil procedure and code of professional responsibility. *See* App. 17a.[12]

Guidance is needed from this Court to protect both the integrity of *Noerr* immunity and the courts as well as the legal profession's ethical and professional standards. This Court should grant review of the decision below to resolve the confusion and conflict among the circuits on the applicability of *Noerr-Pennington* to non-parties and on the existence and scope of a fraud exception to *Noerr-Pennington* immunity—a question expressly left open by this Court in *Professional Real Estate Investors*.

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[12] The Fourth Circuit suggested possible violations of, *inter alia*, Md. R. Prof'l Conduct 3.3 ("A lawyer shall not knowingly make a false statement of material fact or law to a tribunal."), Md. R. Prof'l Conduct 8.4 ("It is professional misconduct for a lawyer to * * * engage in conduct involving dishonesty, fraud, deceit, or misrepresentation [or] engage in conduct that is prejudicial to the administration of justice."), and Md. R. 2-535 (allowing court to revise the judgment "in case of fraud, mistake, or irregularity"). *See* App. 17a. The district court made similar suggestions of violations. *See* App. 51a-52a.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 00-1141

BALTIMORE SCRAP CORPORATION, formerly known as Brooklyn Salvage Corporation,

Plaintiff-Appellant,

v.

THE DAVID J. JOSEPH COMPANY, t/a United Iron & Metal Company; DAVID J. WORKUM, III; JOHN DOES 1-10; I. D. SHAPIRO; JAMES SHAPIRO; CHARLES BAUM; UNITED HOLDINGS COMPANY, INCORPORATED; UNITED OPERATING COMPANY, INCORPORATED; UNITED INVESTMENT ENTERPRISES PARTNERSHIP,

Defendants-Appellees.

FRANCIS X. DUGGAN; RICH & HENDERSON, PC; DONALD LEVENSON; MARLEN TRADING COMPANY; ISAAC M. NEUBERGER; THOMAS M. WOOD, IV; WARREN K. RICH; TIMOTHY R. HENDERSON; DAVID B. IRWIN,

Movants.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Benson E. Legg, District Judge.
(CA-96-827-L)

Argued: November 1, 2000

Decided: January 18, 2001

Before WILKINSON, Chief Judge, WILLIAMS, Circuit Judge, and Frank J. MAGILL, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Affirmed by published opinion. Chief Judge Wilkinson wrote the opinion, in which Judge Williams and Senior Judge Magill joined.

COUNSEL

ARGUED: Lewis A. Noonberg, PIPER, MARBURY, RUDNICK & WOLFE, L.L.P., Baltimore, Maryland, for Appellant. G. Jack Donson, TAFT, STETTINIUS & HOLLISTER, L.L.P., Cincinnati, Ohio; Carter G. Phillips, SIDLEY & AUSTIN, Washington, D.C., for Appellees. **ON BRIEF:** Kathleen A. Ellis, PIPER, MARBURY, RUDNICK & WOLFE, L.L.P., Baltimore, Maryland; Charles S. Hirsch, Robert A. Scott, BALLARD, SPAHR, ANDREWS & INGERSOLL, L.L.P., Baltimore, Maryland, for Appellant. Daniel R. Warncke, TAFT, STETTINIUS & HOLLISTER, L.L.P., Cincinnati, Ohio; Robert J. Carson, Gary R. Jones, Baltimore, Maryland, for Appellees; Thomas M. Wood, IV, Allan P. Hillman, NEUBERGER, QUINN, GIELEN, RUBIN & GIBBER, P.A., Baltimore, Maryland, for Appellees.

OPINION

WILKINSON, Chief Judge:

This antitrust case stems from a protracted dispute over Baltimore Scrap Corp.'s attempt to install a scrap metal shredder in Baltimore, Maryland in 1991. Baltimore Scrap alleges that the defendants violated the Sherman Act, 15 U.S.C. § 1 (1994), by surreptitiously financing litigation in state court in order to prevent or delay Baltimore Scrap's entry into the market. The defendants argue that the *Noerr-Pennington* doctrine immunizes those who petition the courts from antitrust liability. The district court ruled that although the defendants' conduct was wrong, it was nonetheless protected by *Noerr-Pennington*. *See Baltimore Scrap Corp. v. The David J. Joseph Co.*, 81 F. Supp.2d 602, 603 (D. Md. 2000). Because neither the sham exception nor the fraud exception to *Noerr-Pennington* immunity applies here, we affirm the judgment of the district court.

I.

On July 15, 1991, Baltimore Scrap leased land in the city of Baltimore in order to install a metal shredder there. Baltimore Scrap's proposed shredder caused great concern among two groups. The first was comprised of citizen associations of Baltimore who opposed the shredder on environmental grounds. These organizations voiced their opposition to the Maryland Department of Environment and to the Mayor of Baltimore in August of 1991.

The defendants, including The David J. Joseph Co. (DJJ), I.D. Shapiro, and the Shapiro family, composed the second group. The defendants controlled the only other metal shredder in the Baltimore area. DJJ and Shapiro wanted to ensure that their shredder maintained its monopoly in that area. Unlike the citizen groups, however, DJJ and Shapiro did not publicly voice their concerns about Baltimore Scrap's proposed shredder. Indeed, until their role was inadvertently revealed in late March of 1993, the defendants' plan to prevent Baltimore Scrap from building a shredder was a closely-guarded secret.

In September of 1991, Baltimore Scrap applied for a zoning permit from the Baltimore City Board of Municipal and Zoning Appeals. In November, the leaders of the citizen groups testified against the permit. One week later, the Board denied Baltimore Scrap's application. Baltimore Scrap appealed this decision to the Baltimore City Circuit Court, which upheld the Board.

In May of 1992, Baltimore Scrap filed a new zoning application with the Board. Because the Baltimore zoning code does not allow the Board to consider "substantially the same proposal" until twelve months after the previous application was denied, Baltimore Scrap changed its application to add new protections against soil contamination at the site. The Board ruled that the application was different enough to warrant a new hearing even though twelve months had not elapsed since the previous denial of the permit. The Board then approved a permit for Baltimore Scrap on August 6, 1992.

At this point, Shapiro decided to secretly fight the approval of the permit. Shapiro's attorney contacted another lawyer, David Irwin, to handle the appeal. An employee from a different company co-owned by Shapiro contacted Gloria Sipes. Sipes was the president of one of the citizen groups, the Community of Curtis Bay Association. The employee told Sipes that local businesses would pay for an attorney if the citizen groups wanted to appeal the Board's decision. The employee told Sipes to contact David Irwin for the appeal. The caller did not reveal her identity, or who she represented. Sipes consulted with the other citizen groups, and they decided to accept the support of their unknown benefactor. The citizen organizations did not ask who was funding the appeal and "did not care" who paid the lawyer.

Irwin filed his appeal on behalf of the citizen groups on August 27, 1992. Irwin understood that DJJ and Shapiro controlled the appeal. Baltimore Scrap moved to dismiss the appeal based on the citizen groups' lack of standing. After the statutory appeal period expired, Sipes moved to intervene

in the lawsuit as an individual party. Judge Ward of the Baltimore City Circuit Court ruled that the citizen groups and Sipes all had standing, and granted Sipes' motion to intervene. He thus denied Baltimore Scrap's motion to dismiss.

Chief Judge Hammerman, also of the Baltimore City Circuit Court, heard the citizen groups' appeal on the merits on January 7, 1993. He agreed with Judge Ward that Sipes' motion to intervene was timely. After originally ruling for the citizen groups on the merits, Chief Judge Hammerman eventually affirmed the Board's decision to grant Baltimore Scrap a permit once the Board clarified a technical point. The citizen groups filed a motion with Chief Judge Hammerman to stay his decision pending appeal.

Throughout this time, DJJ and Shapiro left no public trace of their involvement in the lawsuit. In late March, however, a so-called "errant fax" exposed the role of the defendants. This fax was supposed to go to a lawyer working for DJJ and Shapiro, but instead was sent to a friend of Baltimore Scrap's president. On April 3, Irwin met with representatives from the citizen groups involved the lawsuit. He told them that DJJ and Shapiro were funding the litigation. He asked them whether they wanted to continue with the appeal. The citizen groups decided to keep pursuing the appeal, despite the knowledge of DJJ and Shapiro's involvement.

Baltimore Scrap argued in its opposition to the motion to stay that the lawsuit was a fraud because DJJ and Shapiro were the real parties in interest. Irwin responded in his pleadings that the notion that the defendants directed the conduct of this case or drafted the previous motion was "preposterous, inflammatory, and not based in reality." Irwin emphasized in open court during an April 23 hearing on the motion to stay that the citizen groups were the only parties he represented. When Chief Judge Hammerman questioned Irwin about the errant fax, Irwin told the judge that nothing in the errant fax "says my law firm is involved with" DJJ and Shapiro. Irwin stated to the court, "I continue to deny, as my

papers do, that I am representing anyone but the people represented here." Chief Judge Hammerman denied Irwin's motion to stay because he thought that the citizen groups did not have a likelihood of success on appeal. In reaching this decision, Chief Judge Hammerman observed that he saw the hand of the defendants in the lawsuit, and that "they have gone from the role of an interested observer to the role of an active participant."

Despite the denial of the motion to stay, the citizen groups appealed to the Maryland Court of Special Appeals. In a twelve-page opinion, the Court of Special Appeals denied the appeal. *See Sipes* v. *Board of Municipal and Zoning Appeals*, 635 A.2d 86 (Md. Ct. Spec. App. 1994). It called the case "dead on arrival in the circuit court" because the citizen groups did not have standing since they were neither an aggrieved party nor a taxpayer. *Id.* at 97; *accord id.* at 89. Although Sipes as an individual did have standing, her motion to intervene was time-barred as a logical extension of the citizen groups' lack of standing. *Id.* at 94. The citizen groups did not pursue an appeal from this decision. Baltimore Scrap's shredder became fully operational in July, 1993.

Baltimore Scrap sued DJJ, the Shapiro family, and the Shapiro family's companies. The complaint alleged violations of the Sherman Act, 15 U.S.C. § 1, violations of Maryland antitrust law, Md. Code Ann. Com. Law. II §§ 11-204 et seq., and various state common law tort claims including malicious use of process, abuse of process, and fraud. The district court found that the defendants' actions were "deceitful," "underhanded," and "morally wrong." *Baltimore Scrap Corp.*, 81 F. Supp.2d at 603. Nevertheless, the district court dismissed Baltimore Scrap's claims because of the defendants' *Noerr-Pennington* immunity. *See id.* Baltimore Scrap now appeals.

II.

The *Noerr-Pennington* doctrine guarantees citizens their First Amendment right to petition the government for redress without fear of antitrust liability. *See Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 136-39 (1961); *United Mine Workers of Am.* v. *Pennington*, 381 U.S. 657, 669 (1965). In *Noerr*, the Supreme Court held that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Noerr*, 365 U.S. at 136. Indeed, the Court emphasized that "[t]he right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.* at 138.

Antitrust law was thus not intended to impose a barrier between the people and their government. Because it is "neither unusual or illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors," the Supreme Court has made clear that the Sherman Act generally does not prohibit the petitioning of public bodies for relief. *Id.* at 139. Indeed, an "anticompetitive purpose [does] not illegalize" concerted attempts to influence public officials "even though the resulting official action damaged other competitors at whom the conduct was aimed." *Pennington*, 381 U.S. at 669.

Noerr-Pennington immunity from antitrust laws extends to petitioning the courts as well. *See California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510-11 (1972). Federal antitrust law is thus generally not an appropriate means of collaterally attacking state judicial judgments because of *Noerr-Pennington*'s holding that the rights of petition and association trump any anticompetitive effects that might occur from asking the government for redress. Any other rule would allow the specter of satellite

litigation to restrict the primary right of citizens to seek justice from the judicial system.

III.

Noerr-Pennington immunity from lawsuits has two main exceptions, however — "sham litigation" and, arguably, fraudulent litigation. *See Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus.*, 508 U.S. 49, 60, 61-62 n.6 (1993) (*PRE*); *accord Noerr,* 365 U.S. at 144. Baltimore Scrap argues that both exceptions operate to strip the defendants of any *Noerr-Pennington* immunity.

A.

We address the sham exception to *Noerr-Pennington* immunity first. Sham litigation must meet a two-part test. *See PRE,* 508 U.S. at 60-61. First, the lawsuit must be objectively baseless. A lawsuit is objectively baseless only if "no reasonable litigant could realistically expect success on the merits." *PRE*, 508 U.S. at 60. If an objective party can "conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr,* and an antitrust claim premised on the sham exception must fail." *Id.* By definition, a winning lawsuit is a "reasonable effort at petitioning for redress and therefore not a sham." *Id.* at 60 n.5. Second, in the event the challenged litigation is found to be objectively baseless, the lawsuit must further conceal an attempt to interfere directly with the business relationships of a competitor. *Id.* at 60-61. Because the litigation at issue in this case was not objectively baseless, our analysis stops after the first prong of the test.

Lawsuits are not objectively baseless simply because a litigant lost. In *PRE,* the Supreme Court held that Columbia Pictures had a reasonable basis for believing it might win a copyright infringement case despite the fact that the Ninth Circuit dismissed the lawsuit as a matter of law. *See PRE,* 508 U.S. at 63-65. The Court pointed to the fact that two other circuits expressly declined to follow the Ninth Circuit's holding as well as the criticism that the Ninth Circuit's

opinion engendered among commentators. *See id.* Even in the absence of this contrary authority, the Court held that Columbia Pictures would have been entitled to press a novel claim if a similarly situated litigant could have perceived some likelihood of success. *See id.* at 65.

Baltimore Scrap argues that the litigation was a sham because the defendants knew that the citizen groups did not have standing and Sipes did not timely move to intervene. Baltimore Scrap cites *In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987), and *Landmarks Holding Co.* v. *Bermant*, 664 F.2d 891 (2d Cir. 1981), to support its claim. In *Burlington Northern*, railroad companies allegedly tried to prevent or delay the construction of a coal pipeline by engaging in sham petitioning of the courts. *See* 822 F.2d at 521. Some of the railroad companies knew that they had no standing or had no reasonable basis for asserting standing. Still, they joined in the lawsuit. *See id.* at 530. The court held that the defendants' actions were not protected by *Noerr-Pennington* because the litigation was baseless. *Id.* In *Landmarks Holding*, owners of a shopping mall sued a competing shopping mall knowing that they lacked the standing to do so. *See* 664 F.2d at 893. These owners also subsidized litigation by various citizens to stop the competing mall without the citizens' knowledge that the shopping mall owners were funding the lawsuit. *See id.* at 893-94. The court held that because all the lawsuits were meritless, *Noerr-Pennington* did not protect the defendants' actions. *See id.* at 896.

The case at bar differs substantially from both *Burlington Northern* and *Landmarks Holding*. First, both these cases were decided before the Supreme Court enunciated its test for sham litigation in *PRE*. Second, and more importantly, in both cases the defendants knew or reasonably should have known that they lacked standing and therefore that their claims were baseless.

In this case, an objective litigant could reasonably expect to achieve success on the merits. Although the zoning lawsuit

was eventually dismissed due to lack of standing, Judge Ward ruled for the citizen groups on the standing issue and allowed Sipes to intervene. Chief Judge Hammerman indicated that after his independent research, he probably would agree with Judge Ward if he needed to rule on standing. The Court of Special Appeals disagreed, but only after making a "logical extension" of its intervention rule and after a reasoned opinion. *Sipes,* 635 A.2d at 94. As the district court noted, the "success before two judges of the Circuit Court for Baltimore City demonstrates a reasonable basis" for the litigation position. 81 F. Supp.2d at 614. The fact that the Court of Special Appeals ultimately dismissed the lawsuit on the standing issue makes no difference in deciding whether an objective litigant could reasonably expect to have success on the merits. Judged by this latter standard, the zoning litigation was not a sham.

B.

Baltimore Scrap maintains, however, that *Noerr-Pennington* analysis is inapplicable to this case because DJJ and the Shapiro family did not petition the government since they were not parties to the zoning litigation. Baltimore Scrap argues that *Noerr-Pennington* protects litigants only, not third parties who covertly funded the lawsuit. *See PRE,* 508 U.S. at 60 ("If an objective *litigant* could conclude that the suit is reasonably calculated to elicit a favorable outcome . . . .") (emphasis added).

PRE is not so restrictive as to protect only the litigant from later antitrust liability. *See Liberty Lake Investments, Inc.* v. *Magnuson,* 12 F.3d 155, 157-59 (9th Cir. 1993). The fact that a third party funded the litigation cannot govern the analysis of the objective merit of a lawsuit. *See id.* As the Sixth Circuit put it, "[I]t would avail an antitrust plaintiff nothing to show that the defendant had surreptitiously caused a front man to institute a lawsuit against the plaintiff, even if the suit proved to be without merit, absent a showing of clear abuse of process." *Opdyke Investment Co.* v. *City of Detroit,* 883 F.2d 1265, 1273 (6th Cir. 1989).

Baltimore Scrap again relies on *Burlington Northern* for the proposition that a third party who does not have standing to pursue a lawsuit in its own right does not receive *Noerr-Pennington* immunity. *See Burlington Northern*, 822 F.2d at 531. In *Burlington Northern,* Union Pacific Railroad did not join the litigation against the coal pipeline company as a party. However, it provided legal assistance to the state of Nebraska. Most parties, as well as the district court, did not know of Union Pacific's involvement in the lawsuit. *See id.* at 530-31. The court held that if Union Pacific did not have standing against the pipeline company in its own right, it would not receive the protection of *Noerr-Pennington. See id.* at 531 and n.11.

Baltimore Scrap argues that since the defendants in this case likewise did not have standing to pursue the appeal, they do not receive *Noerr-Pennington* immunity. We are wary of relying on *Burlington Northern,* however, given the fact that the Supreme Court in *PRE* specifically disapproved of *Burlington Northern* in fashioning its two-part sham litigation test. *See PRE,* 508 U.S. at 55 n.3. Indeed, post-*PRE* cases with similar facts have recognized that the defendant's standing to bring a lawsuit is not germane in deciding whether the lawsuit itself was objectively meritless. *See, e.g., Liberty Lake*, 12 F.3d at 155. In *Liberty Lake*, a developer named Harry Magnuson solicited and financed straw parties to prosecute an environmental challenge against a competing business. *See Liberty Lake,* 12 F.3d at 158. The *Liberty Lake* court undertook the normal, two part analysis for sham litigation despite the fact that Magnuson was behind the litigation. *See id.* at 157-58. In a case decided before *PRE,* this circuit declined as well to deny *Noerr-Pennington* immunity to non-litigants. *See Hospital Building Co.* v. *Rex Hospital*, 691 F.2d 678 (4th Cir. 1982) (non-litigants who caused a government entity to file litigation entitled to jury charge of *Noerr-Pennington* immunity).

In this case, we need not decide whether the defendants themselves had independent standing to pursue the zoning litigation in state court because the standing of third parties

does not control the sham litigation analysis. Funding of litigation by a non-party can be petitioning to the same extent that filing a lawsuit itself is petitioning. *See Liberty Lake*, 12 F.3d at 157-59; *Opdyke*, 883 F.2d at 1273. Indeed, non-parties often provide aid to litigants, whether through financial backing, legal assistance, amicus briefs, or moral support. The fact that an amicus brief, for example, might be filed by a non-party with some anti-competitive aim does not strip from the amicus its *Noerr-Pennington* right to petition the courts. The realities often are that litigation cannot be entirely financed out of the pocket of the party bringing suit. And the costs of supporting a party's right of access to public bodies need not entail the defense of a collateral antitrust suit. To hold that only parties who have standing in their own right receive the protection of *Noerr-Pennington* immunity is to artificially restrict that doctrine by penalizing even the lawful support of objectively meritorious actions.

Such a limited rule would also severely curtail the rights of all citizens to petition the government and to associate with others who do so. The First Amendment freedoms of petitioning and of association protect groups who for whatever reason want to contribute to a lawsuit openly or to stand apart from public view while another party files a lawsuit, assuming no rule or statute independently requires disclosure of the aid. Accordingly, because the litigation was not objectively baseless, and because the source of funding this lawsuit in no way affected the legitimacy of the claims advanced, the district court correctly held that the lawsuit was not sham litigation. As that court noted, Baltimore Scrap has "fail[ed] to show how the legal questions raised by the citizens groups in the zoning appeal would have lacked objective merit had the role of the defendants been known." 81 F. Supp.2d at 615-16.

IV.

Baltimore Scrap argues in the alternative that even if the lawsuit was not sham litigation, the defendants' actions do

not deserve *Noerr-Pennington* immunity because of the fraud exception to *Noerr-Pennington*.

In *PRE*, the Supreme Court specifically left open the question of whether a fraud exception to *Noerr-Pennington* exists. "We need not decide here," the Court stated, "whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations." *PRE*, 508 U.S. at 62 n.6. If a fraud exception to *Noerr-Pennington* does exist, it extends only to the type of fraud that deprives litigation of its legitimacy. See *Cheminor Drugs* v. *Ethyl Corp.*, 168 F.3d 119, 123-24 (3d Cir. 1999). ("While we do not condone misrepresentations in a judicial setting, neither will we deprive litigants of immunity derived from the First Amendment's right to petition the government if the alleged misrepresentations do not affect the core" of the litigant's case.); *Liberty Lake*, 12 F.3d at 158-59 *(PRE* "does not obviate application of the Court's two-part test for determining sham litigation in the absence of proof that a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy."). Alleged frauds that "do not infect the core" of a case will receive *Noerr Pennington* immunity because regardless of the alleged fraud, the outcome would have been the same. *Cheminor*, 168 F.3d at 123. If a judgment is not procured by fraud or deceit, it cannot fall within any fraud exception to *Noerr-Pennington*. *See PRE*, 508 U.S. at 61-62 n.6; *Liberty Lake*, 12 F.3d at 158-59. Because Baltimore Scrap cannot show that the state court judgment was procured by fraud or deceit, we need not reach the question of whether a fraud exception to *Noerr-Pennington* still exists after *PRE*.

Baltimore Scrap alleges three instances of fraud that deprive the litigation of legitimacy: 1) the defendants' clandestine funding of the citizen groups; 2) the misstatements that Irwin made to Chief Judge Hammerman at the April 23, 1993 hearing about the defendants' role in financing the lawsuits; and 3) the fabricated environmental

issues that the citizen groups supposedly raised in their pleadings. Like the district court, we in no way condone the actions of the defendants. Whether to condemn their activities, however, is a different question than whether to abrogate *Noerr-Pennington* immunity for conduct that does not deprive the lawsuit of legitimacy. In achieving an overall public benefit like the right to petition, any immunity will shield individual instances of conduct that might otherwise be actionable. None of the defendants' alleged frauds infected the core of the lawsuit's legitimacy.

Baltimore Scrap first argues that the defendants' failure to inform the citizen groups who was funding the lawsuit deprives the litigation of legitimacy. Specifically, Baltimore Scrap contends that if DJJ or the Shapiro family had revealed its involvement in the litigation, the citizen groups would not have accepted the funding and the lawsuit would have been dropped. Baltimore Scrap specifically points to the testimony of Gloria Sipes, who testified that had she known the defendants were behind the lawsuit, she would not have taken their money. Even if these allegations are true, they do not rise to the level of fraud on the courts. This alleged fraud was solely between the parties. The defendants' failure to tell the citizen groups that they were behind the litigation did not deceive the courts because the courts were not the target of this alleged deception. As the district court noted, Baltimore Scrap's "central problem, which it is unable to overcome, is that the arguments presented by the citizens groups were legitimate, both objectively and subjectively." 81 F. Supp.2d at 617.

The citizen groups can of course sue the defendants for fraud. Whether such an action by the citizen groups against the defendants for fraud would be successful is another matter. First, and most importantly, the citizen groups were not duped into pursuing a claim they did not want to litigate. In fact, the citizens' objections to Baltimore Scrap's metal shredder existed well before the defendants offered to pay for further litigation. Soon after the citizens learned of the proposed shredder, they voiced their opposition. They

attended a meeting with the Maryland Department of Environment on August 12, 1991 to protest the shredder. They wrote a letter to the mayor of Baltimore on August 26 urging him to block its installation. The citizens were extremely worried about the environmental damage that the shredder could cause, especially the increase in air pollution, the release of potentially toxic chemicals, and the potential of higher cancer rates.

Indeed, the citizen groups knew that "local businesses" were paying for the litigation. Despite knowing this fact, they decided to take the money because, as Sipes testified, they "[did] not care" who funded the lawsuit. Moreover, the defendants revealed their involvement to the citizen groups on April 3, 1993. After learning that the defendants were funding the litigation, the citizen groups nevertheless decided to continue their appeal. In sum, the evidence concerning the defendants' secret funding of the lawsuit, construed in the light most favorable to Baltimore Scrap, fails to rise to the level of fraud among the parties. It falls far short of showing the type of fraud upon the court that would deprive the litigation of its legitimacy.

Second, Baltimore Scrap contends that Irwin's alleged misrepresentations to the court about the role of the defendants in the lawsuit constitutes fraud that deprives the litigation of legitimacy. For purposes of summary judgment, we of course assume all facts in the light most favorable to Baltimore Scrap. The problem with Baltimore Scrap's argument remains, however, that Irwin's alleged misstatements were simply not material. Chief Judge Hammerman, before he ruled, stated that he saw the hand of the defendants in the lawsuit. Indeed, he presumed the defendants were involved before he issued his opinion against the citizen groups and the defendants. The result would have been the same even if Irwin had admitted the defendants' role because no judicial ruling was based on the erroneous assumption that the citizens alone were pursuing the appeal and fully funding the litigation.

If Irwin did indeed misrepresent facts to the court, the proper remedy here is through Maryland law, whether it be through the sanctioning process of the state bar, *see, e.g.*, Md. R. Prof. Conduct 3.3 ("A lawyer shall not knowingly make a false statement of material fact or law to a tribunal."), Md. R. Prof. Conduct 8.4 ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation [or] engage in conduct that i[s] prejudicial to the administration of justice."), Md. R. 16-812 (adopting the Maryland Rules of Professional Conduct), *Attorney Grievance Comm'n of Maryland* v. *Middleton*, 756 A.2d 565, 573-74 (Md. App. 2000) (upholding state bar's indefinite suspension of a lawyer because of intentional misrepresentations to a court since "candor and truthfulness are two of the most important moral character traits of a lawyer") (internal quotations omitted); the state Rules of Civil Procedure, *see* Md. R. 1-311 (stating that the effect of a lawyer's signature on the pleadings is to represent "that to the best of the attorney's knowledge, information, and belief there is good ground to support" what was written, and imposing potential disciplinary action for "a wilful violation of this Rule"), Md. R. 1-341 (awarding attorney's fees if "the conduct of any party in maintaining or defending any proceeding was in bad faith . . ."), Md. R. 2-535 (allowing court to revise the judgment "in case of fraud, mistake, or irregularity"), Md. Code Ann. Cts. & Jud. Proc. § 6-408 (1998) (same); or another similar process. The states are perfectly capable of handling malfeasance in their own courts. Federal antitrust law is simply not the proper vehicle to punish an attorney's misconduct in state court.

Baltimore Scrap finally charges that the defendants fabricated environmental issues that caused the litigation to be deprived of legitimacy. Even if true, however, the lawsuit was not decided on environmental grounds. Rather, the lawsuit revolved around the issues of standing and intervention. In no way did the so-called environmental fabrications infect the core of the litigation's legitimacy.

We reiterate that the Supreme Court has not approved a fraud exception to *Noerr-Pennington* immunity at all. *See PRE*, 508 U.S. at 61-62 n.6; *Cheminor*, 168 F.3d at 123-24. Yet the fraud exception as Baltimore Scrap conceives it would have wide ranging implications for our federal system as well as the *Noerr-Pennington* doctrine. A broad fraud exception would allow federal collateral litigation over conduct in state courts that never affected the core of a state judgment. It is simply not the role of federal courts hearing antitrust lawsuits to reconsider the underlying validity of a state zoning contest. We would have to immerse ourselves in the minutiae of state civil proceedings and in effect relitigate the claims that the state courts have already decided. For the federal courts to entertain this type of antitrust action would impermissibly impact the right to petition a coordinate system of justice. Such concerns weigh heavily against creating any broad exception to the immunity created by *Noerr* and its numerous progeny.

V.

The replay of state law zoning disputes is not normally the proper function of antitrust litigation, especially when the alleged fraud did not deprive the litigation of its underlying legitimacy and when the lawsuit is not objectively meritless. We hold as a matter of law that the defendants' actions do not warrant the dissolution of *Noerr-Pennington* immunity. For the foregoing reasons, the judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BALTIMORE SCRAP CORP.	:	
	:	
v.	:	CIVIL NO. L-96-827
	:	
THE DAVID J. JOSEPH CO., et al.	:	

MEMORANDUM

This is an antitrust suit. Before this Court are the defendants' motions for summary judgment. Because the parties have extensively briefed the issues, the Court will dispense with a hearing. *See* Local Rule 105.6 (D. Md. 1999). For the reasons stated herein, the Court will, by separate Order, grant the defendants' motions and close the case.

I. Introduction

Because of the complexity of the facts, a brief introduction may be useful. In 1991, the plaintiff, the Baltimore Scrap Company, ("Baltimore Scrap" or "BSC"),[1] proposed installing a new scrap metal shredder in the Fairfield section of Baltimore City. The proposal required zoning approval from the City. A coalition of citizens groups openly opposed the shredder on environmental grounds. The defendants,[2]

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[1] During the events giving rise to this lawsuit BSC was known as Brooklyn Salvage Corporation. For the sake of clarity, the parties have used "Baltimore Scrap" to refer to both the present corporation and its predecessor, a practice the Court will adopt.

[2] There are two sets of defendants in this case, all of whom are past or present owners of the existing shredder. The relationship

who owned an existing shredder and did not welcome the competition, secretly set about to thwart BSC's zoning application.

After initially rejecting it, the Board of Municipal Zoning Appeals (BMZA) approved Baltimore Scrap's application on August 6, 1992. The defendants had standing to appeal the BMZA's decision to the Circuit Court for Baltimore City. The defendants were concerned, however, that an appeal in their name, a competitor with a spotty environmental track record, would lack credibility.[3] The defendants decided that bankrolling an appeal by a citizens group, while masking their own involvement, presented a better strategy.

To carry out their plans, the defendants contacted an attorney and offered to pay him if he were, in turn, approached by the citizens groups. An employee of one of the defendants' subsidiaries (Marlen Trading Company), posing as a "concerned local business," approached the citizens groups, offering that if the citizens wished to pursue an appeal of the BMZA decision, Marlen would pay their legal costs, including attorneys' fees. The employee also steered the citizens to the attorney whom the defendants had already contacted. The citizens groups accepted the offer. Neither Marlen nor the attorney told the citizens that the defendants, rather than an environmentally concerned local business, were behind the appeal.

Over the next seven months, the defendants were actively, albeit clandestinely, involved in the citizens' appeal. The defendants paid the bills, reviewed the pleadings, and suggested strategies. Eventually, however, the defendants' involvement in the zoning litigation came to light through what the parties refer to as the "errant fax."

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among the various defendants and their involvement with this case are explained later in this Memorandum.

[3] The defendants anticipated that part of the appeal would raise environmental issues.

Ultimately, Baltimore Scrap's application was successful and its shredder was built. BSC argues, however, that the appeal delayed the installation of the shredder by approximately eighteen months. Claiming fraud and violation of the antitrust laws, the plaintiff filed the instant suit.

The Court finds the defendants' actions deceitful and underhanded. This is a conclusion reached not only by this Court, but also by the defendants' own antitrust attorney. Concerned that their secret role in the zoning appeal might expose them to antitrust liability, the defendants consulted Richard Wertheimer, a partner at the Washington, DC law firm of Arnold & Porter. Wertheimer advised the defendants that their actions, while probably not illegal, were unworthy of a respectable business.

Although morally wrong, the defendants' disguised role in the zoning appeal was not illegal. Under the *Noerr-Pennington* doctrine, a company may, even secretly and for anticompetitive purposes, sponsor a lawsuit against a competitor, so long as the lawsuit is neither a sham, meaning that it is not objectively baseless, nor fraudulent.

The appeal was not sham litigation. Although ultimately unsuccessful, the citizens' appeal raised bona fide legal issues, including (i) whether the citizens had standing to appeal, and (ii) whether the BMZA had used the appropriate legal standard in authorizing a zoning permit for the new shredder.

Nor do the defendants' actions add up to fraud. The errant fax unmasked the defendants' involvement in the litigation before the Circuit Court for Baltimore City had issued its final decision. Baltimore Scrap has not shown that the litigation would have been shorter had the courts known from the outset that the defendants were clandestinely financing and advising the appeal. Nor is there evidence that any judicial rulings were predicated upon the misassumption that the citizens, and the citizens alone, were pressing the appeal.

This Opinion is not meant to condone the defendants' tactics. The Court agrees with Attorney Wertheimer that the defendants' actions were unworthy of a legitimate business. At the same time, however, the Court finds that the defendants' actions fell short of violating the antitrust laws.

II. Factual Background

A. Litigation Timeline

The following summarizes the major events in the history of the zoning litigation:

July 1991:	Baltimore Scrap Company leased Carbon Avenue junk yard site.
November 25, 1991:	BMZA rejected BSC's application for a construction permit. Vote was 3-1 in favor of issuing the permit, but four votes were required for approval.
August 6, 1992:	BMZA approved BSC's second application for a construction permit. The Board found the second application substantially different from the first. The language of the Board's decision appeared to classify the proposed shredder as a material recovery facility (MIRF). Such a classification would be incorrect, because a MIRF: (i) is not authorized to accept certain types of metal which the shredder was to process, and (ii) must be contained in an enclosed facility.
August 27, 1992:	Citizens groups, represented by David Irwin, filed an appeal of the BMZA's decision in the Circuit Court for Baltimore City.

October 13, 1992: Gloria Sipes moved to intervene as a plaintiff in the zoning appeal. Shortly thereafter, BSC moved to dismiss the zoning appeal, arguing the citizens groups lacked standing and Sipes's Motion to Intervene was time-barred.

December 7, 1992: Hearing on procedural motions held before Judge Thomas Ward. Judge Ward granted Ms. Sipes's Motion to Intervene and denied BSC's Motion to Dismiss.

January 7, 1993: Hearing on the merits of the zoning appeal held before Chief Judge Robert I.H. Hammerman. Chief Judge Hammerman approved of Judge Ward's procedural rulings. He further ruled that substantial evidence supported the Board's conclusion that the 1992 application was substantially different from the first. He remanded the case to the BMZA, however, so that the Board could explain why it had classified the shredder as a MIRF.

February 25, 1993: Hearing before Chief Judge Hammerman on Baltimore Scrap's motion to alter or amend judgment. BSC produced the Gadhia affidavit. The affidavit stated that: (i) the Board's reference to the MIRF provisions was unintentional; and (ii) the BMZA made a clerical error in classifying the proposed shredder as a MIRF. According to Gadhia, the shredder should have been considered a structural alteration to a

junk yard conditional use. With this correction, the BMZA's decision was now internally consistent and correct, Gadhia explained.

March 1, 1993: Chief Judge Hammerman accepted the Gadhia affidavit even though it was not part of the administrative record, and was written after the record had been transmitted to the Circuit Court for Baltimore City.

Chief Judge Hammerman decided that the Gadhia affidavit cured the inconsistencies in the BMZA decision. Accordingly, he granted BSC's motion to alter or amend judgment by (i) not remanding the case to the BMZA, and (ii) affirming the BMZA's decision.

March 24, 1993: The involvement of the defendants was first exposed with the transmission of the errant fax.

March 25, 1993: The citizens groups moved to stay enforcement of Chief Judge Hammerman's ruling pending appeal to Court of Special Appeals.

April 3, 1993: Irwin met with leaders of the citizens groups and revealed the identity of their benefactors. After discussion, the citizens groups decided to continue with the appeal.

April 23, 1993: Chief Judge Hammerman denied the citizens groups' Motion to Stay Enforcement, and stated he perceived the hand of United Holdings in the appeal.

January 7, 1994: Court of Special Appeals remanded the case with instructions to dismiss the appeal, holding the citizens groups lacked standing and Sipes's intervention was time-barred.

B. The Metal Shredding Industry

Shredding companies buy scrap metal, shred the metal, and sell the processed scrap to steel mills, foundries, and scrap metal brokers. Eventually, the shredded scrap is melted down and reprocessed. Shredders operate on a narrow profit margin, representing the difference between the price they must pay for scrap (e.g. junked cars and dishwashers) and the price they receive from mills and brokers. Competition from another shredder squeezes the profit margin by driving up the scrap metal price and driving down the price of processed scrap.

Prior to the events giving rise to this lawsuit, the United Iron & Metal Company operated at 2545 Wilkens Avenue in southwest Baltimore the only shredder in the metropolitan area. Before 1990, the United shredder was owned by the defendants referred to during this litigation as the "Shapiro defendants."[4]

In September, 1990, the David J. Joseph Company ("DJJ") bought the United Iron & Metal shredder from the Shapiro defendants. DJJ, which is based in Cincinnati, Ohio, is the

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[4] The Shapiro defendants are: I.D. Shapiro; James Shapiro; Charles Baum; United Holdings Co., Inc. (a successor to United Iron & Metal); United Operating Co., Inc.; and United Investment Enterprises Partnership. The plaintiff's complaint focuses on the actions on [sic] I.D. Shapiro. Based upon papers presented to the Court, James Shapiro and Charles Baum played minor roles in the events giving rise to this lawsuit. Because judgment is being entered in favor of all the Shapiro defendants, the Court has not been called upon to determine whether James Shapiro and Charles Baum are more than nominal defendants.

largest metal recycler in the United States.[5] The deal was structured so that the Shapiro defendants retained a financial interest in the Wilkens Avenue operation.

Metal recycling and shredding can create significant environmental problems. Cars and refrigerators contain many other materials besides valuable steel scrap. Freon, upholstery, plastics, and a host of other "contaminants" must be removed either before or during shredding. In such a low margin business, shredders have an economic disincentive to spend money controlling and containing the non-salable by-products. Over the years, community and environmental groups lodged repeated complaints about excessive noise and pollution coming from the United Iron & Steel's Wilkens Avenue plant. *See, e.g.,* Plaintiff's Exh. 26.

David Simon, the president of Baltimore Scrap, operated a recycling business in Pennsylvania. Seeking to expand, Simon sought to open a shredder in New York State. In the face of community opposition, however, his permit was denied. Having already purchased the shredding machine intended for installation in New York, Baltimore Scrap looked for an alternative location.

In July 1991, Baltimore Scrap leased a junk yard located at 1600 Carbon Avenue in Baltimore. The owner, Mr. Frank Gambel, had installed and operated two shearers, which were a more primitive type of metal recycling machinery. After leasing 1600 Carbon Avenue, Baltimore Scrap closed down the shearers and began cleaning the lot in preparation for the new shredder.

Prior to Baltimore Scrap's public announcement, DJJ received word of the new potential competitor. On July 18, 1991, DJJ's Baltimore manager, David Workum, sent a memo to DJJ executive James Breth. *See* Plaintiff's Exh. 12.

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[5] The amended complaint named as additional defendants the David J. Joseph Co. ("DJJ") and the manager of its Baltimore facility, David J. Workum, III.

Workum wrote that he had heard "in the past three to six months" that BSC was planning to install a shredder. DJJ began working behind the scenes to block BSC:

> Through connections of I.D. Shapiro and Warren Rich, we are trying to block Brooklyn's move to install a shredder. . . . Warren Rich is attempting to find any EPA problems Simon may have had [elsewhere], again to discredit his permitting attempt. Warren is handling all this so as to keep DJJ and United's name out of the picture.[6]

Id.

Prior to any zoning application being filed, DJJ (i) knew Baltimore Scrap intended to become a competitor in the Baltimore scrap market, (ii) was seeking ways to prevent that from happening, and (iii) realized that it would be unwise for a shredder company with its own environmental problems publicly to oppose Baltimore Scrap's application.

C. The 1991 Zoning Hearing

In September 1991, Baltimore Scrap filed an application with the Baltimore zoning administrator for a permit to install the new shredder at the Carbon Avenue site. *See* DJJ Defendants' [hereinafter "DJJ"] Exh. Al. Because BSC's application called for structural alterations to a conditional use, the application, under Baltimore zoning regulations, was automatically appealed to the Baltimore Board of Municipal and Zoning Appeals ("BMZA"). The appeal was apparently *de novo*, meaning that the BMZA could consider testimony and decide issues of fact.

DJJ continued to investigate ways to prevent Baltimore Scrap's entry into the scrap metal market. Two attorneys working for DJJ, Warren Rich and Timothy Henderson, contacted the Maryland Department of the Environment to

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[6] Warren Rich was an attorney representing DJJ. At the time he was affiliated with the firm of Graham and James.

determine if BSC had ever been the subject of any environmental investigations. *See* Plaintiff's Exh. 24. As early as July 1991, I.D. Shapiro and his attorney, Isaac Neuberger,[7] contacted several city officials and political figures to voice their objections to Baltimore Scrap's application. *See* Plaintiff's Exh. 1 at 38-41; Second Dep. of I.D. Shapiro at 570-72, 580-82.[8]

Concerned about the antitrust implications of these activities, DJJ, on November 6, 1991, consulted Richard J. Wertheimer of Arnold & Porter. Wertheimer advised DJJ Vice President Stephen Wulff that legitimate petitioning of the government was protected by the *Noerr-Pennington* doctrine, but lying or deceit was not. Dep. of Stephen Wulff at 90-94.

Through Attorney Timothy Henderson, DJJ, on November 19, 1991, submitted to the Baltimore Department of Planning and Zoning a study of the Baltimore scrap market. The report, prepared by DJJ, inferred that the new shredder was not needed because the shredding capacity of the Baltimore market exceeded the demand.[9] *See* DJJ's Exh. D12.

On the same day, the BMZA held its hearing on Baltimore Scrap's application. A number of individual citizens and

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[7] Neuberger's law firm, Neuberger, Quinn, Gielen, Rubin & Gibber, P.A., is called "The Neuberger Firm" by parties, and will be so called by the Court.

[8] DJJ officials were aware of Shapiro's efforts. *See* Plaintiff's Exh. 21.

[9] BSC contends the conclusions reached in the Henderson report are false. BSC claims the defendants underestimated the amount of scrap available in the Baltimore area by assuming that No. 2 steel, including white goods, automobile bumpers, and portions of automobile fenders, cannot be shredded. *See* Aff. of David M. Simon, Plaintiff's Exh. 3. The defendants, on the other hand, assert they used standard industry assumptions in making their estimates. This dispute is not material, because there is no evidence that the zoning authorities gave any consideration to the Henderson report. *See* Part III.B.3.c, *infra*.

citizens groups appeared to testify against the application. Many of the witnesses cited environmental objections. *See* Plaintiff's Exh. 4. On November 25, 1991, the BMZA voted 3-1 in favor of the zoning variance. Because four votes were required for approval, the application was denied.[10] The member casting the opposing vote cited environmental reservations. *See* BMZA Resolution, DJJ Exh. A5.

D. The 1992 Zoning Hearing and Initial Appeal

In the summer of 1992, Baltimore Scrap again sought approval from the zoning board for a construction permit.[11] Under Baltimore City zoning law, a zoning application disapproved by the BMZA cannot be considered again by the Board for one year. The one-year waiting period does not apply if the application is "substantially" different from the one previously rejected. In this case, BSC argued that the 1992 application was substantially different because it proposed to protect groundwater by paving the site with concrete and installing an oil/water separator. The BMZA accepted BSC's argument and considered the second application before the one-year waiting period had expired. *See* DJJ Exh. B6.

Many of the same citizens groups that had opposed the 1991 application again appeared before the Board. This time, however, the BMZA was apparently convinced that the proposal had sufficient environmental safeguards. On August 6, 1992, Baltimore Scrap prevailed: the BMZA issued a written decision granting the construction permit. *See* DJJ Exh. B8. In the text of its decision, however, the BMZA erroneously referred to the shredder as a material recovery facility ("MIRF"). As will be seen, this clerical error was to cause problems for the BMZA and Baltimore

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[10] One of the five BMZA members was absent, meaning that a unanimous vote in favor of Baltimore Scrap would have been required.

[11] As in 1991, the decision of the zoning administrator was automatically transmitted to the BMZA for review.

Scrap, because a MIRF is not authorized to accept certain varieties of ferrous metals which the shredder was intended to process. In addition, a MIRF must be contained in an enclosed facility, which the proposed shredder was not.[12]

I.D. Shapiro discussed with his Attorneys, Rich and Neuberger, the option of filing an appeal in United Holdings's name. *See* Plaintiff's Exh. 1 at 16. As a taxpayer, United Holdings would have enjoyed standing to appeal the BMZA's decision to the Circuit Court for Baltimore City. The group was concerned, however, that an appeal by a competitor, especially one with a spotty environmental track record, would lack credibility.

Instead, the group struck upon the idea of funding an appeal by the citizens. At the defendants' behest, an official of the Marlen Trading Company[13] approached Gloria Sipes, the president of the Community of Curtis Bay Association ("CCBA"). The defendants chose Ms. Sipes because she had spoken in opposition to Baltimore Scrap's application. The Marlen official told Sipes that "local businesses" wanted to fund an appeal, and that if interested she should contact attorney David Irwin. On August 24, 1992, Ms. Sipes called Irwin. *See* Dep. of David Irwin at 25. Isaac Neuberger had already spoken with Irwin, promising that he would be compensated if he represented the citizens groups. *See id.* at 27-28.

The defendants devised a roundabout scheme to handle payments to Irwin. Irwin submitted bills to CCBA. *See, e.g.*, Plaintiff's Exh. 14. Sipes transmitted the bills to Marlen Trading, which wrote checks to CCBA. Sipes, in turn, endorsed the checks to Irwin's firm. DJJ later reimbursed

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[12] As stated in Part II.E *infra*, the Board did not intend to classify the shredder as a MIRF. As explained in the Gadhia affidavit, the Board's decision mistakenly quoted provisions of the zoning code relating to a MIRF.

[13] I.D. Shapiro owned a "substantial interest" in Marlen Trading. *See* DJJ Mem. Supp. Summ. J. at 18.

Marlen Trading for its outlays. *See* Plaintiff's Exhs. 15 & 16.

On August 27, 1992, Irwin filed an appeal on behalf of the citizens groups in the Circuit Court for Baltimore City. The named appellants were three citizens groups: Community of Curtis Bay Association Inc., Concerned Citizens for a Better Brooklyn, Inc., and Maryland Waste Coalition. The names of Shapiro, DJJ, and United Iron & Metal did not appear on the court papers. *See* DJJ Exh. C1.

The appeal asserted three grounds for reconsideration of the zoning board's decision: (i) that Baltimore Scrap's second application was not substantially different from its first application; (ii) that the zoning board had improperly classified Baltimore Scrap's facility as a "MIRF" (material recovery facility), whereas in fact a MIRF is not authorized to accept certain ferrous metals the shredder would be processing; and (iii) if the facility were properly classified as a MIRF, then the Board's decision was also erroneous because it misquoted and misconstrued provisions of the zoning code pertaining to enclosure requirements of a MIRF. On October 13, 1992, Irwin moved to add Gloria Sipes as a plaintiff.

Baltimore Scrap filed two procedural objections to the appeal. It opposed Ms. Sipes's Motion to Intervene as time-barred, and it moved to dismiss the appeal on the grounds that the citizens groups lacked standing because they were neither taxpayers nor "aggrieved persons". *See* BSC Motion to Dismiss or In the Alternative, for Summary Judgment, DJJ Exh. C10. The procedural motions were assigned to Judge Thomas Ward, an Associate Judge of the Circuit Court for Baltimore City, who held a hearing on December 7, 1992.[14] Judge Ward granted the Motion to Intervene (adding Gloria

[14] Unfortunately, there is no transcript of the December 7 hearing because of a mechanical problem with the court reporter's recorder.

Sipes as a plaintiff), and denied Baltimore Scrap's Motion to Dismiss. *See* DJJ Exh. C16.

The zoning case on its merits was assigned to Chief Judge Robert I.H. Hammerman of the Circuit Court for Baltimore City. During a hearing on January 7, 1993, Chief Judge Hammerman commented upon and approved Judge Ward's earlier procedural ruling. He stated: "[W]ithout having heard oral argument, if I were to have made the decision last night after all my research on this and reading the authorities, I would have decided the same way." Transcript of Hearing, DJJ Exh. C19 at 5.

During the hearing, Chief Judge Hammerman also ruled that substantial evidence supported the BMZA's determination that the second application was substantially different from the first. At the same time, however, he observed that he might have ruled differently had the standard of review offered him more latitude: "I'm not saying that if I were to decide it totally unencumbered, so to speak, that I would find the same way as the Board."[15] *Id.* at 27.

Chief Judge Hammerman nevertheless remanded the case to the BMZA for reconsideration of the plaintiffs' second and third arguments: to wit, that the Board had misclassified the application as a MIRF, and that the proposed facility would not meet the requirements of a MIRF. Addressing Baltimore Scrap's arguments that the classification was simply a clerical error, Chief Judge Hammerman stated:

> I am not prepared to say this was a slip of the pen, a slip of the tongue . . . . There are several places on page two, and even on page three, which would clearly indicate that the Board is looking upon this as a materials recovery

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[15] On appeal to the Circuit Court, a zoning board's decision must be upheld if supported by substantial evidence. *See, e.g., Aaron* v. *City of Baltimore*, 207 Md. 401, 406, 114 A.2d 639 (1955).

> facility . . . . So I just cannot share the argument or the characterization by the Appellees that this means nothing, this language, [is] simply to be totally ignored.

Id. at 28.

Both the DJJ and Shapiro defendants were closely involved with the citizens' appeal. I.D. Shapiro paid Irwin's legal fees via Marlen Trading Company. Isaac Neuberger and I.D. Shapiro communicated with Irwin concerning strategies for the case. *See* Plaintiff's Exhs. 13 & 47. Thomas "Sam" Wood, a member of the Neuberger firm, forwarded copies of the pleadings to I.D. Shapiro, noting that Irwin "is representing our interest." Plaintiff's Exh. 30. Irwin admits he sent "most, if not all" of his pleading drafts to Wood, and that the Neuberger firm was a "resource in this case." Dep. of David Irwin at 35. In contrast, Mr. Irwin did not submit these drafts to Ms. Sipes or the citizens groups for prior approval. *See id.*

At the same time, both the DJJ and Shapiro defendants continued to mask their involvement.[16] Their names never appeared on the papers. The citizens groups were not told who (beyond Marlen Trading Company) was funding their appeal.[17] *See, e.g.*, Deps. of Gloria Sipes at 213, Doris

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[16] The plaintiff argues that the defendants concealed their identity, in part, because had the citizens groups known a competing shredder company, with environmental problems of its own, was funding the appeal they would not have accepted the assistance. *See, e.g.*, Dep. of Gloria Sipes at 142, 213. During discovery in the instant case, Ms. Sipes and others were questioned as to what their reaction would have been had they known of the Shapiro defendants' role. The citizens' reactions were mixed. All said they would have been upset. Some testified that they would probably have accepted the money. Others testified that in retrospect they would have rejected the funding, even though without Marlen's financial support, the appeal would not have been possible. *See infra* Part III.B.3.a.

[17] Defendants point out that I.D. Shapiro's interest in Marlen Trading is on file with the Maryland Department of Assessments and Taxation and is therefore a matter of public record. While

McGuigan at 25, Delores Barnes at 43. Neither Gloria Sipes nor the citizens groups were told that I.D. Shapiro and his personal attorneys were vetting the pleadings and suggesting strategies.

The plaintiffs did, however, have hints that the defendants were involved in the zoning appeal. On August 25, 1992, Colleen Darden, a BSC employee, received a call from a person identifying himself as William Thomas.[18] Thomas said that "United Iron & Metal gave the people who were fighting us a very large sum of money. . . ." DJJ Exh. D37. Darden forwarded the message to David Simon. *See* February 18, 1998 Dep. of David Simon at 426.

E. Reconsideration of Chief Judge Hammerman's Ruling and Court of Special Appeals Decision

Baltimore Scrap requested Chief Judge Hammerman to reconsider his decision to remand the case to the BMZA.[19] In support of its motions, BSC submitted an affidavit it had obtained from BMZA chairman Lalit Gadhia ("the Gadhia affidavit"). DJJ Exh. C26. Gadhia stated that the Board's August 6, 1992 decision had mistakenly cited provisions of the zoning code relating to a material recovery facility (MIRF). The decision should have instead referred to a structural alteration to a junk yard conditional use.[20]

Defendants are correct, a technical corporate filing hardly amounts to disclosure to a citizen group.

[18] The true identity or affiliation of "William Thomas" remains unknown.

[19] On or about January 18, 1993, Baltimore Scrap filed Motions for a New Trial, to Alter or Amend Judgment, and to Revise Judgment. *See* DJJ Exh. C20.

[20] A material recovery facility (MIRF) is not authorized to accept certain varieties of ferrous metals which BSC was to process. It must also be completely enclosed. The citizens groups argued that by approving the BSC shredder as a MIRF, the Board had applied an incorrect statutory standard. By explaining the

On February 25, 1993, Chief Judge Hammerman held a hearing on Baltimore Scrap's motions. Benjamin Rosenberg, counsel for Baltimore Scrap, conceded that the BMZA's decision was confusing, but stated that the confusion was cleared up by the Gadhia affidavit. Rosenberg argued: "The Court's confusion and our confusion was perfectly understandable in light of the way this decision was written. We now know unmistakably and indisputably that that was a mistake." Transcript of hearing, DJJ Exh. C27 at 23.

Over Irwin's objections, Chief Judge Hammerman accepted Gadhia's affidavit and found it persuasive proof that the Board did not intend to classify BSC's shredder as a MIRF. Rather, the MIRF classification was a clerical error. The BMZA intended instead to approve the application as a structural alteration to a junk yard conditional use, which was authorized under Baltimore zoning code to accept a full range of ferrous metals.[21] Chief Judge Hammerman granted BSC's Motion and affirmed the BMZA decision of August 6, 1992. This meant BSC's permit would issue.

The defendants' covert involvement during the appeal continued. I.D. Shapiro met with DJJ President Louis Terhar on February 23, 1993 and asked Terhar to reimburse him for the legal expenses he had incurred in fighting BSC's zoning application. Shapiro boasted he had "saved him [Terhar] so far by full-time maneuvering two years." Dep. of I.D. Shapiro at 515-16. On March 1, Terhar agreed to fund further appeals. Dep. of Louis Terhar at 6-11.

The defendants' cloak of secrecy began to unravel on March 24, 1993. David Workum intended to fax to Attorney

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references to a MIRF as a mistake, the Gadhia affidavit made the Board's decision internally consistent.

[21] Although the parties disagreed over the meaning of the term "structural alteration to a junk yard conditional use," Chief Judge Hammerman stated that the affidavit proved the "Board was approving the application for the uses requested." DJJ Exh. C27 at 27.

Warren Rich a copy of a draft motion to stay Chief Judge Hammerman's ruling. Instead, the fax was mistakenly sent to a third party, Harry Lenick, a Pittsburgh scrap dealer.[22] Workum had obtained the draft from the Neuberger Firm, which had in turn received it from Irwin. Upon receiving the "errant fax," Lenick forwarded it to Baltimore Scrap's President David Simon.

The following day, March 25, Irwin, on behalf of the citizens groups, moved to stay enforcement of Chief Judge Hammerman's judgment pending appeal to the Maryland Court of Special Appeals. *See* DJJ Exh. 29. In its opposition memorandum, Baltimore Scrap drew the Court's attention to the errant fax, arguing that the citizens groups were only acting as "surrogates" for the real parties in interest, United Holdings and persons associated with United. Baltimore Scrap also demanded the citizens groups post a supersedeas bond pending the appeal.

In a reply brief filed April 16, 1993, Irwin, arguing for the citizens groups, stated, "United is not, openly or 'under the table,' the real party in interest in this case, and has in no way 'enlisted Appellants to serve as United's stalking horse to prosecute the appeal' of the Board's decision." DJJ Exh. C37 (quoting BSC opp. mem.). Irwin further argued that a bond was inappropriate, in part because the citizens groups and Ms. Sipes lacked sufficient funds to obtain one. *Id.*

Around the same time, in late March, Wulff again consulted with attorney Richard Wertheimer of Arnold & Porter. After discussions with both Wulff and Wood, Wertheimer advised Wood that Irwin had an ethical obligation to disclose to Ms. Sipes and the citizens groups the source of the financial support for their appeal.

On April 3, Irwin met with leaders of the citizens groups and revealed the involvement of United Holdings, I.D.

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[22] This transaction has come to be known in the litigation as the "errant fax."

Shapiro, and Marlen Trading in funding the appeal. At least some of the groups' leaders were "upset" and "disappointed" about the identity of their benefactor, but, after a lengthy discussion, they decided to press on with their appeal. *See* Deps. of David Irwin at 411-27, Gloria Sipes at 120-21, 248, Mary Rosso at 60.

On April 23, 1993, Chief Judge Hammerman held a hearing on the citizens groups' motion to stay enforcement. Chief Judge Hammerman questioned Irwin concerning the involvement of the defendants:

CHIEF JUDGE HAMMERMAN: Mr. Irwin --

MR. IRWIN: Yes, sir.

CHIEF JUDGE HAMMERMAN: You state, with respect to the [s]talking horse matter, that the only people you represent are the good people sitting here who are neighbors and residents.

MR. IRWIN: That is absolutely correct.

* * *

CHIEF JUDGE HAMMERMAN: How do you explain the affidavit [of Mr. Lenick] and how do you explain that Exhibit A [the errant fax]?

MR. IRWIN: I don't believe I have to explain it, Your Honor, in the sense that my law firm hasn't been sending anything -- I mean, there is nothing in this affidavit that says my law firm is involved with United in any --

DJJ Exh. 38 at 28-29.

Chief Judge Hammerman denied the motion to stay, stating that there was no likelihood the citizens would succeed on appeal. Chief Judge Hammerman also noted that, despite Irwin's disclaimers, he perceived the "hand of United Holding Company" in the appeal:

> I am suggesting . . . that it is clear to me that United has an interest in the outcome of this case and has carried that interest beyond simply standing on the sidelines as an interested observer but has participated in the legal effort to prevent Brooklyn Salvage from achieving their goal. I think they have gone from the role of an interested observer to the role of an active participant.

DJJ Exh. C38 at 34.

Although their motion to stay had been denied, the citizens groups pressed on with their appeal to the Court of Special Appeals.[23] The citizens groups urged the Court of Special Appeals to reverse because the Circuit Court had committed the following errors: (i) considering Gadhia's affidavit, which was not part of the agency record; (ii) giving weight to Gadhia's affidavit even though the affidavit contradicted a unanimous resolution of the BMZA; (iii) affirming the BMZA's decision even though the resolution cited inapplicable provisions of law; and (iv) determining that the BMZA's revised decision was supported by substantial evidence. *See Sipes* v. *Board of Municipal and Zoning Appeals*, 99 Md. App. 78, 81, 635 A.2d 86 (Md. Ct. Spec. App. 1994).

On January 7, 1994, the Court of Special Appeals issued an opinion and order which remanded the case with instructions to dismiss the appeal. The Court held that the citizens groups lacked standing because they were neither taxpayers nor "aggrieved" parties. Gloria Sipes as an individual and a taxpayer did have standing, but her motion to intervene was time-barred. The Court of Special Appeals stated the case was thus, "dead on arrival in circuit court." *Sipes,* 99 Md. App. at 99. The citizens groups did not petition for certiorari

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[23] During the summer of 1993, Irwin and I.D. Shapiro communicated directly about Irwin's legal fees for the appeal. *See* Plaintiff's Exh. 31. It is unclear from the record whether the Marlen Trading reimbursement scheme continued during this period.

to the Maryland Court of Appeals. Zoning in hand, Baltimore Scrap built the new shredder.

F. Filing of the Lawsuit

Baltimore Scrap filed the instant suit on March 19, 1996. Discovery was complicated because so many lawyers and law firms were witnesses. With the approval of both sides, the Court appointed a special discovery master, Rignal W. Baldwin, Jr. Mr. Baldwin functioned most effectively, attending depositions, reviewing documents, and resolving privilege questions as they arose. Without Mr. Baldwin's assistance, discovery would not have proceeded as smoothly as it did.

As amended, Baltimore Scrap's complaint advances seven counts as follows: (i) federal antitrust violations of the Sherman Act, 15 U.S.C. §1; (ii) state antitrust violations of Maryland's antitrust law, Md. Code Ann. Com. Law II § 11-204 et seq.; (iii) malicious use of process; (iv) abuse of process; (v) tortious interference with prospective advantage; (vi) fraud; and (vii) conspiracy.

III. Analysis

A. Summary Judgment Standard

Summary judgment standards apply equally to antitrust cases as to others. *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451, 468 (1992); *Thompson Everett, Inc.* v. *National Cable Advertising, L.P.*, 57 F.3d 1317, 1322 (4th Cir. 1995). The Court may grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986). In order to survive summary judgment, the non-moving party must present evidence from which a reasonable jury could return a verdict in its favor. *Monsanto Co.* v.

Spray-Rite Service Corp., 465 U.S. 752, 768 (1984); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The complexity of antitrust cases does not make summary judgment inappropriate. On the contrary, Rule 56 may prove a particularly appropriate and useful tool for sorting out the "unusual entanglement of legal and factual issues frequently presented in antitrust cases . . . [and] is favored as a mechanism to secure the just, speedy and inexpensive determination of a case, when its proper use can avoid the cost of trial." *Thompson Everett*, 57 F.3d at 1322 (citations omitted).

The Court must take care not to foreclose trial when the case presents genuinely disputed, material facts. Nevertheless, as the Fourth Circuit made clear in *Thompson Everett*, (i) "the mere existence of some disputed facts does not require that a case go to trial," and (ii) "[t]he disputed facts must be material to an issue necessary for the proper resolution of the case, and the *quality and quantity* of the evidence offered to create a question of fact must be adequate to support a jury verdict." *Id.* at 1323 (citations omitted) (emphasis added).[24]

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[24] Thus, "if the evidence is merely colorable or not significantly probative, it may not be adequate to oppose entry of summary judgment. . . . While we have recognized generally that when considering a motion for summary judgment, the district court must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion, we hasten to add that those inferences must, in every case, fall within the range of reasonable probability and *not be so tenuous as to amount to speculation or conjecture*." *Thompson Everett*, 57 F.3d at 1323 (citations omitted) (emphasis added).

B. Noerr-Pennington Immunity

1. Background

The central premise of *Noerr-Pennington*[25] immunity is that those who petition government for redress are generally immune from antitrust liability. *See Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49, 56, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993) ("*PRE*"). The doctrine extends to use of the courts. *See California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). Absent aggravating "plus factors," a party, even with anti-competitive intent, may provide clandestine support for litigation instigated by another party without incurring liability. *See e.g., Liberty Lake Investments Inc.* v. *Magnuson*, 12 F.3d 155, 159 (9th Cir. 1993); *Opdyke Investment Co.* v. *City of Detroit*, 883 F.2d 1265, 1273 (6th Cir. 1989); *City of Cleveland* v. *Cleveland Electric Illuminating Co.*, 734 F.2d 1157, 1162 (6th Cir.), *cert. denied*, 469 U.S. 884 (1984). In *Opdyke*, the Sixth Circuit held: "[I]t would avail an antitrust plaintiff nothing to show that the defendant had surreptitiously caused a front man to institute a lawsuit against the plaintiff, even if the suit proved to be without merit, absent a showing of clear abuse of process." 883 F.2d at 1273 (citing *City of Cleveland*, 734 F.2d at 1163).

The defendants concede that their conduct was anti-competitive, but assert that it is protected by the *Noerr-Pennington* doctrine. The plaintiffs disagree. Citing two exceptions to the doctrine, they point out that *Noerr* immunity does not protect: (i) sham litigation; or (ii) litigation based on fraud. They argue that the defendants'

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[25] The doctrine was first developed by the Supreme Court in the legislative and executive context in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) and *Mine Workers* v. *Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965).

actions during both the 1991 and 1992 appeals fall within these exceptions. The applicability of the two exceptions will be examined in turn.

2. The Sham Exception

The Supreme Court set out a two-part test for the "sham" exception to the *Noerr-Pennington* doctrine in *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49, 113 S.Ct. 1920, 123 L.Ed.2d 464 (1993) ("*PRE*"). The Court held that a court may examine a litigant's subjective motivation only if the challenged litigation is "objectively baseless":

> First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. Only if the challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of a sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere *directly* with the business relationships of a competitor," through the "use of the governmental process -- as opposed to the outcome of that process -- as an anticompetitive weapon."

PRE, 508 U.S. at 60-61 (footnote and citations omitted).

The Court also cautioned in a footnote that an unsuccessful suit should not automatically be viewed as meritless:

> A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham. On the other hand, when the antitrust defendant has lost the underlying litigation, a court must "resist the understandable temptation to engage in post hoc reasoning by concluding" that an ultimately unsuccessful

> "action must have been unreasonable or without foundation."

Id. at 60 n.5 (citations omitted).

The plaintiff urges that the defendants' actions are unprotected by *Noerr-Pennington* because they fall within the "sham" litigation exception. BSC argues that the 1992 appeal was both objectively baseless and subjectively motivated to interfere with business relations through the use of a governmental process.

The Court must first determine if the issues raised in the zoning appeal were objectively baseless. If not, the defendants' subjective motivation in bringing the suit is irrelevant. BSC urges that the following arguments made during the 1992 appeal were frivolous:

a. Standing

Baltimore Scrap asserts that the defendants' 1992 appeal was objectively baseless because the citizens groups lacked standing to appeal. BSC adds that Gloria Sipes's motion to intervene on October 13, 1992 was also objectively baseless because it was filed out of time. In support of its argument, BSC points to deposition testimony and contemporaneous notes of Irwin and his associates showing they knew standing was problematic. As its strongest claim, BSC cites the opinion of the Court of Special Appeals: "[t]he Organizations did not have standing, and Sipes did not file a timely appeal. Sipes simply could not use Rule 2-214 to resuscitate a case that was dead on arrival in the circuit court." *Sipes*, 99 Md. App. at 99.

Because the citizens' standing argument was ultimately rejected on appeal does not mean that it was devoid of merit. It must be borne in mind that Judge Ward, after reviewing the briefs and hearing the arguments of counsel, accepted the

citizens' argument.[26] Chief Judge Hammerman stated that he had independently researched the standing issue and would likely have agreed with Judge Ward if called upon to rule. *See* DJJ Exh. C19 at 4-5. In reaching its decision on the timeliness of Sipes's intervention, the Court of Special Appeals stated it was making a "logical extension" of its standing rule. *Sipes*, 99 Md. App. at 94. The section of the Court of Special Appeals's opinion addressing the standing and intervention issues consumes 12 pages. *See id.* at 87-99. Clearly, the standing and intervention issues were not meritless questions of law to be summarily rejected. Thus, they were not "objectively baseless."

As their deposition testimony and contemporaneous notes demonstrate, Irwin and his associates were aware that they faced a difficult legal battle to establish standing. No evidence suggests, however, that they considered the standing argument hopeless. Irwin's success before two judges of the Circuit Court for Baltimore City demonstrates a reasonable basis for his litigation position. Under the objective standard enunciated in *PRE*, the subjective views of the defendants are not relevant as long as the legal standing argument urged by Irwin had objective merit, which it did.[27]

b. The Procedural Nature of the Zoning Appeals

Baltimore Scrap also argues that the citizens' zoning appeal was objectively baseless because it raised only procedural

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[26] Although no transcript of the December 7, 1992 hearing before Judge Ward exists, the plaintiff has not raised any objection to the conduct of the hearing.

[27] The Fifth Circuit has noted: "[T]o the extent the litigant has a reasonable basis for believing that his claim of standing might be accepted by the court, and thus that he will have the right to participate in the litigation process and obtain relief, he will be protected by *Noerr-Pennington* even though he ultimately loses." *In re Burlington Northern, Inc.*, 822 F.2d 518, 520 (5th Cir. 1987). The *Burlington* court went on to observe that only a party advocating a patently frivolous standing argument would lose *Noerr-Pennington* protection.

objections to the BMZA's decision, rather than challenging the substantive merits of BSC's application. BSC asserts that because the citizens only raised procedural objections, their appeal was in bad faith, as the citizens knew, or should have known, that the construction permit would ultimately be granted after the procedural defects were cured. The citizens were thus fighting a rearguard stalling action, which BSC argues should not be protected by *Noerr-Pennington*.[28]

The Court finds several flaws in BSC's argument. First, BSC argues that under Maryland law, the BMZA would have had no choice but to reapprove BSC's application on remand because the citizens groups had presented no substantive evidence in opposition to the proposed shredder. *See, e.g., Turner* v. *Hammond*, 270 Md. 41, 55, 310 A.2d 543 (1973) ("[I]f there is no probative evidence of harm or disturbance . . . a denial of an application . . . is arbitrary, capricious, and illegal." (citation omitted)). But as Chief Judge Hammerman put it at the January 7, 1993 hearing, on remand Baltimore Scrap would "have to start all over again before the Board."[29] DJJ Exh. C19 at 29. On remand, the slate

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[28] Analyzing this argument requires a brief review of the procedural history of the case. As discussed in Section II, *supra*, the BMZA rejected BSC's application on environmental grounds in November 1991. After modifying its application by proposing to add an oil/water separator and to pave the site with concrete, BSC reapplied the following year. The BMZA approved this second application on August 6, 1992.

Under Maryland law, a court reviews a zoning board's decision to determine if the decision was supported by "substantial evidence." *See, e.g., Aaron* v. *City of Baltimore*, 207 Md. 401, 406, 114 A.2d 639 (1955). In their appeal, the citizens did not attack the merits of the BMZA's environmental findings. They instead objected to alleged defects both in BSC's second application (i.e. that the second application was not significantly different from the first) and in the BMZA's approval of BSC's second application (i.e. that BSC's shredder was improperly classified as a MIRF).

[29] Because Chief Judge Hammerman found that the Board's determination that BSC's second application was substantially

would have been wiped clean and the citizens would have had a new opportunity to oppose the shredder on environmental grounds. They would have been able to present new evidence and make new arguments. It is, therefore, not a legal certainty that the BMZA would have reached the same result.

Second, procedural objections are not necessarily frivolous. Procedural rules exist so that legal questions will be decided in a fair and orderly manner. The citizens were entitled to complain that the BMZA had not followed the proper procedure. The procedural objections that the citizens raised can hardly be classified as obstructionist nitpicking. Aside from the proposed paving and oil/water separator, BSC's 1992 application was in many ways similar to its 1991 application. The Board nevertheless found that the applications were "substantially" different, and so the second application was considered and approved less than one year after the first one was rejected.[30] At the January 7, 1993 hearing, Chief Judge Hammerman found the BMZA's determination on the matter supported by substantial evidence. Nevertheless, he also stated that if he were reviewing the decision under a less restrictive standard he would not necessarily "find the same way as the Board." Thus, the citizens' objection on this issue was not objectively baseless.

Third, the BMZA's original August 6, 1992 decision was confusing and would not have been upheld absent the Gadhia affidavit. At the January 7, 1993 hearing Chief Judge Hammerman stated he was not convinced that the erroneous classification of the BSC shredder as a MIRF was a mere

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different than the first was supported by substantial evidence, that issue was not subject to review on remand.

[30] As explained in Part II.D, *supra*, once an application is rejected by the BMZA, the applicant must normally wait one year before reapplying, unless the second application is "substantially" different from the first.

"slip of the tongue." DJJ Exh. C19 at 28. The citizens cannot be faulted for having taken the appeal initially. They also cannot be faulted for later arguing that the Gadhia affidavit was inadmissible. The affidavit was not part of the agency record, and there were legitimate questions as to whether the reviewing court could consider it.[31]

c. The Relevance of the Defendants' Concealment

Baltimore Scrap next argues that the successes of the citizens groups before Judge Ward and Chief Judge Hammerman should be discounted because the involvement of the defendants was not known to the court at the time. This argument fails because under *PRE* only objectively baseless litigation is a sham. Baltimore Scrap fails to show how the legal questions raised by the citizens groups in the zoning appeal would have lacked objective merit had the role of the defendants been known.

As discussed *supra,* the questions of standing, of whether BSC's second application was substantially different from the first, of whether the BMZA applied the proper standard in approving BSC's application, and of whether the admission of the Gadhia affidavit was permissible were all questions with objective legal merit. As the Supreme Court has instructed, under *Noerr-Pennington* the merits of a case are to be examined under an objective standard. Because a case that is not objectively baseless cannot give rise to antitrust liability, the defendants' involvement in bankrolling the zoning appeal is not actionable.

3. The Fraud Exception

The Supreme Court has noted that "[m]isrepresentations, condoned in the political arena, are not immunized when

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[31] If BSC's contention were accepted, any litigant raising procedural arguments on appeal, even if the appeal were successful in forcing a remand, would face a claim that the appeal was taken in bad faith if it appeared likely that the procedural defect would be cured after remand.

used in the adjudicatory process." *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 512, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). In that case, the plaintiff trucking company sued a competitor that had regularly challenged the plaintiff's application for permits. The plaintiff charged that the defendants had conspired to block the plaintiff's applications for operating rights by instituting " 'proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases.' " *Id.* at 512 (citation omitted). According [to] the plaintiff, the defendants' deliberate misconduct frustrated the plaintiff from using administrative agencies and the courts to obtain operating rights. *See id.* at 518 (Stewart, J., concurring in the judgment).

The District Court dismissed the case for failure to state a claim. On appeal, the Ninth Circuit reversed. On certiorari review, the Supreme Court upheld the Ninth Circuit, holding that these tactics, if proven, were not protected by *Noerr-Pennington*. The Court drew on several earlier cases in support of its holding, noting that unethical conduct in the adjudicatory process often results in sanctions. *See, e.g., Walker Process Equipment, Inc.* v. *Food Machinery and Chemical Corp.*, 382 U.S. 172, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965) (finding use of a fraudulently obtained patent to block a competitor may trigger antitrust liability).

Courts have had some difficulty distinguishing the fraud exception from the sham exception. *Cf. Nobelpharma AB* v. *Implant Innovations, Inc.*, 141 F.3d 1059, 1071 (Fed. Cir. 1998) (noting *PRE* and *Walker Process* are alternative legal theories which "may be applied to the same conduct"). Although the Supreme Court clarified the requirements for sham litigation in *PRE*, it provided considerably less definition of the fraud exception. In a frequently cited footnote, the *PRE* Court took pains to leave open whether

Noerr permits the imposition of antitrust liability due to fraud, absent sham litigation.[32]

Subsequent to *PRE*, lower courts have grappled with the meaning of the fraud exception. This Court finds persuasive the Ninth Circuit's analysis in *Liberty Lake Investments Inc.* v. *Magnuson*, 12 F.3d 155 (9th Cir. 1993).[33] In that case, the Ninth Circuit read footnote 6 to mean that a defendant's fraudulent behavior will strip it of *Noerr* immunity if there is "deceptive conduct which goes to the core of a lawsuit's legitimacy." *Liberty Lake*, 12 F.3d at 158. *See also Hydranautics* v. *Filmtec Corp.*, 70 F.3d 533, 538 (9th Cir. 1995) (finding a fraudulently obtained patent nullifies antitrust immunity); *Whelan* v. *Abell*, 48 F.3d 1247, 1255 (D.C. Cir. 1995) (giving of deliberately false statements to state securities officials not protected by *Noerr* immunity).

The *Liberty Lake* court also found that there is no exception to *Noerr* immunity absent "proof that a party's knowing fraud upon, or its intentional misrepresentations to,

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[32] The Court wrote:

In surveying the "forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations," we have noted that "unethical conduct in the setting of the adjudicatory process often results in sanctions" and that "misrepresentations condoned in the political arena are not immunized when used in the adjudicatory process." We need not decide here whether, and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations. *Cf.* Fed. R. Civ. P. 60(b) (3) . . .; *Walker Process*, 382 U.S. at 179-80 (Harlan, J., concurring).

PRE, 508 U.S. at 61-62 n.6 (some citations omitted).

Defendants suggest that footnote 6 could be interpreted to cast doubt on the survival of the fraud exception after *PRE*. While such an interpretation is plausible, it has not been adopted by any of the courts of appeal applying *PRE* and will not be adopted here.

[33] Subsequent to *PRE*, the Fourth Circuit has not yet discussed the meaning of the fraud and sham exceptions.

the court deprive the litigation of its legitimacy." 12 F.3d at 159. The soundness of this interpretation is further supported by *PRE's* emphasis in footnote 6 on Justice Harlan's concurrence in *Walker Process*, stressing that the Court's holding reached only "deliberate fraud." 382 U.S. at 179-80 (Harlan, J., concurring).

The plaintiff points to instances in which, it contends, the defendants' actions amounted to fraud, depriving the zoning appeal of its legitimacy. This Court disagrees. Although the defendants' actions were unseemly, perhaps unethical, they do not rise to the level of fraud necessary to vitiate *Noerr* immunity. The plaintiff's central problem, which it is unable to overcome, is that the arguments presented by the citizens groups were legitimate, both objectively and subjectively.[34]

a. Fraud on the Citizens' Groups

Baltimore Scrap argues that the defendants defrauded the citizens groups by failing to disclose the defendants' role in funding and steering the 1992-93 appeal. Although the purposeful concealment of the defendants' role was wrong,[35] BSC's argument fails. Several leaders of the citizens groups testified on deposition that they were "upset" by the April 1993 revelation that their benefactor was a metal shredding company. Yet, none of the citizens groups or their leaders have ever contended they were defrauded. Moreover, after the April 3 meeting in which Irwin revealed the identity of the funders, all of the groups elected to accept the financial

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[34] The plaintiff acknowledges that the citizens groups were honestly opposed to the Baltimore Scrap shredder on environmental grounds. Pl. Mem. Opp. Sum. J. at 62 n.19.

[35] It is unclear when Irwin became aware of United's role in funding the zoning appeal. In his deposition, he testified that Isaac Neuberger and Sam Wood told him in August 1992 that he would be compensated if he represented the citizens in the zoning appeal. Irwin stated he was under the impression that businesses would pay him, but he was "not especially" interested in knowing the identity of the businesses. Dep. of David Irwin at 27.

aid and continue their appeal to the Court of Special Appeals.[36]

Second, none of the deceptions the defendants committed on the citizens groups deprived the litigation of its legitimacy. The archetypal case of fraud, *Walker Process*, involved a fraudulently obtained patent. Without the patent, there was no case. Here, by contrast, the central questions raised in the zoning appeal (did the BMZA use the appropriate standard, and then later, did the Circuit Court err in accepting the Gadhia affidavit?) were legitimate, albeit somewhat thin, legal issues.

b. Fraud on the Courts

BSC points to Irwin's arguments before Chief Judge Hammerman following the exposure of the "errant fax." In his reply brief, Irwin denied that United was the "real party in interest" in the case. When Chief Judge Hammerman questioned Irwin on these subjects during the April 23 hearing, Irwin's answers were evasive. In the same reply brief, Irwin also stated that the citizens groups lacked funds to post a bond. In reality, of course, the defendants, who were funding the case, had ample financial resources.

Baltimore Scrap argues that Irwin's written and oral representations to Chief Judge Hammerman constitute fraud. Irwin's behavior may well have violated the spirit, if not the letter, of the Rules of Professional Conduct. *See, e.g., Md. Rules of Professional Conduct* 3.3, Candor Toward the

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[36] The plaintiff argues that, based on statements made in her deposition, Gloria Sipes, the individual plaintiff in the zoning appeal, would have declined to participate in the litigation had she known the true source of funds. Ms. Sipes did not state explicitly that she would have declined. Moreover, had Sipes demurred, the defendants could have found another lead plaintiff such as Mary Rosso or Doris McGuigan. For example, Ms. Rosso, leader of the Maryland Waste Coalition, testified at deposition that although she was "not happy" to find out United was behind the funding, she "really didn't give a darn." Dep. of Mary Rosso at 60.

Tribunal. But it is neither the role of antitrust law, nor of this Court, to regulate the conduct of attorneys appearing in the Circuit Court for Baltimore City. As a general rule, ethical codes do not create standards of liability for lawyers. *See, e.g., Shatz* v. *Rosenberg*, 943 F.2d 485, 492 (4th Cir. 1991). Also, when Chief Judge Hammerman denied the citizens' Motion to Stay pending appeal to the Court of Special Appeals on April 23, 1993, he stated that, despite Irwin's denials, he discerned the defendants' hand in the appeal.[37]

The courts therefore knew of the defendants' involvement at a relatively early stage of the zoning appeal. There is no evidence that any judicial rulings were predicated upon the misassumption that the citizens alone were pressing the appeal. In addition, Baltimore Scrap has produced no evidence to show that the zoning appeal would have been shorter had the courts known from the outset that the defendants were secretly advising and funding the appeal.

BSC also asserts that the defendants committed fraud on the courts by allowing the citizens groups to raise environmental concerns in their 1992 appeal. This argument has two parts. First, BSC contends that the defendants knew that BSC's shredder would be equipped with state-of-the-art pollution controls and would pose no environmental threat to the community.[38] Second, according to BSC, the defendants therefore acted fraudulently by authorizing Irwin to argue on behalf of the citizens that the BSC shredder posed an environmental risk.

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[37] Had the defendants' involvement remained concealed throughout the litigation the analysis might be different.

[38] In support of its contention, BSC cites evidence presented at the BMZA hearing supporting the environmental soundness of the proposed shredder. It also points out that the defendants themselves intended to replace their own shredder with one with environmental safeguards similar to those of the BSC shredder. *See* Pl. Mem. Opp. Sum. J. at 49-54.

The Court rejects this argument. Baltimore Scrap made informal presentations to the community groups to attempt to persuade them that the proposed shredder was equipped with environmental controls and posed no pollution risk. BSC also offered testimony to this effect at the BMZA hearings. The citizens, however, were unpersuaded. For example, the citizens groups' September 4, 1992 petition to the Circuit Court for Baltimore City, in which they sought reversal of the BMZA's approval, stated: "Appellants are concerned about the health risk posed by Brooklyn's proposed shredder, since large quantities of dust, metal fragments and disturbingly loud noises are the by-products of such an operation." DJJ Exh. C2 at 4.

BSC has produced no evidence that the citizens' environmental concerns were false or fraudulent. It is undisputed that the environmental issues raised by the citizens originated with the citizens, not the defendants. It is also undisputed that the citizens genuinely believed in the environmental concerns they raised. The environmental issues are of the type that concerned citizens are permitted to raise in opposition to a zoning application. There is no evidence that the defendants planted spurious environmental questions in the minds of the citizens. Accordingly, the defendants committed no fraud on the courts in financing the citizens' appeal.

c. Fraud on Other Agencies

The plaintiff further claims that the defendants perpetrated a fraud during the 1991 zoning appeal by having Attorney Timothy Henderson submit a report to the Baltimore Department of Planning and Zoning. The report, authored by DJJ, stated that the shredding capacity of the Baltimore scrap market exceeded demand. According to BSC, this report was false.[39]

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[39] The parties dispute the accuracy of the report. For summary judgment purposes, the Court will accept Baltimore Scrap's contention that DJJ's methodology was flawed. Even so, the

Even if BSC could establish that the report contained deliberately false information, the plaintiff has failed to demonstrate fraud. Regardless of the defendants' intent, there is no evidence that the report played a role in the BMZA decision. The Planning and Zoning Department memo concerning the Baltimore Scrap application was sent to the BMZA on October 24, 1991. *See* DJJ Exh. A3. The defendants' report was not received by the Planning and Zoning Department until November 19, the day of the BMZA hearing. Mary Dolan, head of the Coastal Resources Division of the Department of Planning and recipient of the report, stated at her deposition that she did not transmit the report to the BMZA. Dep. of Mary Dolan at 30. Finally, the unnamed BMZA member who cast the vote that denied the plaintiff's 1991 application cited environmental concerns, not size of the market, as the reason for the member's opposition.

The defendants' report was therefore not material to the 1991 BMZA decision. Without reliance on the report by the BMZA, there can be no fraud. *Cf. Interstate Properties* v. *Pyramid Co.*, 586 F.Supp. 1160, 1163 (S.D.N.Y. 1984). In *Interstate Properties*, the court found moral fault with a party's deliberate misrepresentation as to its financial interest in opposing a construction application. The misrepresentation was not actionable, however, because the state denied the application on environmental grounds. Moreover, as the Ninth Circuit observed, "a party should not as a matter of course have the accuracy of its testimony in a prior judicial proceeding subject to subsequent and collateral attack in the form of an antitrust suit." *Omni Resource Development Corp.* v. *Conoco, Inc.*, 739 F.2d 1412, 1414 (9th Cir. 1984) (Kennedy, J.).

As evidence of fraud, the plaintiff also points to handwritten notes of DJJ Vice President David Wulff stating

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plaintiff cannot prove fraud; rather, it only can establish that the report was inaccurate. There is no evidence that the DJJ report contained deliberately false information.

"I.D. influenced that." *See* Plaintiffs' Exh. 25. "I.D." apparently refers to I.D. Shapiro and "that" refers to the 1991 denial of Baltimore Scrap's application. The central tenet of *Noerr-Pennington* immunity is that attempts to influence the process of government, even for anti-competitive purposes, are protected absent fraud. There is no evidence Shapiro influenced the 1991 appeal through fraudulent means such as bribery.

d. Fraud on the Plaintiff

The plaintiff argues the defendants committed fraud by attempting to lull the plaintiff into a false sense of security by suggesting that the defendants were not involved in the citizens groups' lawsuit. One of BSC's attorneys, Stanley Fine, testified at deposition that Isaac Neuberger told him in January 1993 that Irwin was "nosing around" the United shredder on Wilkens Avenue, looking for environmental problems.[40] According to Fine, Neuberger's representations were patently deceitful. As of January 1993, Irwin was working with Neuberger and being paid by United. Neuberger's misrepresentations implied that United and BSC had a common enemy in the citizens groups. Fine then revealed to Neuberger elements of BSC's legal strategy in the zoning appeal, Fine testified. *See* Dep. of Stanley Fine at 227-30; Plaintiff's Exh. 18.

Neuberger's alleged conduct, although reprehensible, would not strip the defendants of *Noerr-Pennington* protection. Any actions the defendants may have taken to put the plaintiff "off the scent" did nothing to deprive the lawsuit of its legitimacy, and are thus protected under *Noerr*. To establish fraud, BSC must show that Neuberger's alleged knowledge of BSC's strategy prolonged the appeal and caused material harm to BSC. Baltimore Scrap has not established what it would have done differently had Neuberger not contacted Fine.

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[40] It is unclear from the record who initiated the January 1993 conversation between Fine and Neuberger.

e. Maryland Zoning Law

The plaintiff contends that the zoning appeal lacked all legitimacy under Maryland law. As support, it cites a line of Maryland cases holding that a zoning appeal aimed solely at preventing competition is illegitimate as matter of law. *See, e.g., Lucky Stores* v. *Board of Appeals*, 270 Md. 513, 312 A.2d 758 (1973). The plaintiff's argument is misplaced. In *Lucky Stores*, the Maryland Court of Appeals noted that "a person whose sole interest for objection to [a] Zoning Board's action is to prevent competition with his established business is not a person aggrieved." 270 Md. at 528. In the instant case, however, the appeal was brought by the citizens groups to address environmental concerns. All parties agree that the citizens held honest objections to BSC's proposed shredder.

4. The State Law Claims

a. State Antitrust Claim

Interpretation of Maryland's antitrust law is to be "guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters." Md. Code Ann. Com. Law II § 11-202(a) (2). Because the defendants are immune from federal antitrust liability, they are likewise immune from liability under Maryland's antitrust statute, Md. Code Ann. Com. Law II § 11-204. *Cf. Hinkleman* v. *Shell Oil Co.*, 962 F.2d 372, 379 (4th Cir. 1992) ("[S]tate claims under section 11-204(a) and (b) must fail where those same claims would also fail under similar federal law") (citation omitted).

b. State Common Law Claims

The plaintiff asserts a number of state common law claims: malicious use of process, abuse of process, tortious interference with prospective advantage, fraud, and conspiracy. Because the defendants' behavior is protected from antitrust liability by the First Amendment under *Noerr-*

Pennington, it is likewise protected from state common law liability.

The plaintiff does not dispute that if *Noerr-Pennington* immunity applies to the antitrust claims it likewise applies to the state common law claims. The Fourth Circuit has noted that the policies behind *Noerr-Pennington* immunity include preserving the "first amendment right to petition government officials." *Ottensmeyer* v. *Chesapeake & Potomac Telephone Co.*, 756 F.2d 986, 993 (4th Cir. 1985). In order to protect First Amendment rights, courts have recognized that *Noerr* immunity applies to common law claims such as those raised by Baltimore Scrap. *See, e.g., Brownsville Golden Age Nursing Home, Inc.* v. *Wells*, 839 F.2d 155, 159-160 (3d Cir. 1988) (recognizing applicability of the doctrine to conspiracy, abuse of process, and other claims); *Havoco of Am., Ltd.* v. *Hollobow*, 702 F.2d 643, 649 (7th Cir. 1983) (applying *Noerr* protection to claims of tortious interference with business relationships).

C. Statute of Limitations

The defendants also assert that the plaintiff's claims are barred by the relevant statute of limitations. Because the defendants' conduct is protected by *Noerr-Pennington* immunity, this issue need not be reached.

IV. Conclusion

For the reasons stated herein, the Court shall by separate Order grant the DJJ defendants' motion for summary judgment on the basis of *Noerr-Pennington* immunity, grant the Shapiro defendants' motion for summary judgment on the basis of *Noerr-Pennington* immunity, and deny as moot the Shapiro defendants' motion for summary judgment as to limitations.

Dated this 6th day of January, 2000.

/s/

Benson Everett Legg
United States District Judge

(2)

Supreme Court, U.S.
FILED
MAY 17 2001
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No. 00-1592

IN THE
Supreme Court of the United States

BALTIMORE SCRAP CORPORATION,
Petitioner,

v.

THE DAVID J. JOSEPH COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit correctly ruled that, if a fraud exception to *Noerr-Pennington* exists, it does not apply to nonmaterial misrepresentations that do not deprive the litigation of its legitimacy.

2. Whether the Fourth Circuit correctly ruled that *Noerr-Pennington* immunity attaches to non-parties that could have but chose not to litigate in their own name, but instead to fund litigation by third parties that is not objectively baseless.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Baltimore Scrap Corp. was the appellant and plaintiff below.

Respondents and defendants below and respondents in this Court are The David J. Joseph Company, t/a United Iron & Metal Company; David J. Workum, III; I.D. Shapiro; James Shapiro; Charles Baum; United Holdings Co. Inc.; United Operating Co. Inc.; and United Investment Enterprises Partnership. The David J. Joseph Company is controlled by parent corporations SHV North America Corporation, SHV Nederland BV, SHV Holdings N.V., and Stichting Administrative Kantoor Lauwerecht. The remaining respondent corporations, United Holdings Company, Inc., United Operating Co., Inc., and United Investment Enterprises Partnership, have no parent corporations, and no publicly held company owns 10% or more of their stock.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, The David J. Joseph Company, t/a United Iron & Metal Company; David J. Workum, III; I.D. Shapiro; James Shapiro; Charles Baum; United Holdings Co. Inc.; United Operating Co. Inc.; and United Investment Enterprises Partnership, hereby oppose the petition for a writ of certiorari filed by the Baltimore Scrap Corp.

STATEMENT OF THE CASE

1. This case arises out of an antitrust suit brought by petitioner Baltimore Scrap Corp. against respondents for their opposition to petitioner's application to erect a scrap metal shredder in Baltimore City. Respondents are all past and current owners, operators, and parties with some financial interest in an existing scrap metal shredder in Baltimore that faced competition from petitioner's shredder. Pet. App. 25a-26a. Before petitioner could install its shredder, it was required to secure the approval of the Baltimore Board of Municipal and Zoning Appeals (the "Board"), which reviews

zoning applications for such projects. Petitioner filed an application with the Board in September 1991. At its hearing on November 19, 1991, the Board received evidence from a variety of sources, including representatives of citizens groups and elected city officials who testified against petitioner's application. *Id.* at 28a-29a. On November 25, 1991, the Board denied the application. *Id.* at 29a. The Circuit Court for Baltimore City affirmed the Board decision. *Id.* at 5a. Respondents had no contact with Board members, no contact with the citizens groups, did not participate in the hearing or the appeal, and played no role in the denial of petitioner's application. See *id.* at 27a-29a.

In May of 1992, petitioner submitted a second application to the Board that responded to certain environmental issues about which the Board previously had expressed concerns. Petitioner claimed that its new application was "substantially different" than the first one.[1] The Board heard evidence in this second review from many of the same citizens groups that had opposed the 1991 application as well as new arguments from petitioner concerning environmental safeguards. Pet. App. 29a. On August 6, 1992, the Board voted to approve the new application. *Id.* However, in issuing its decision, the Board erroneously categorized the approved shredder as a "material recovery facility" or an "MIRF." *Id.* This classification was unquestionably in error because an MIRF must be contained in an enclosed facility and is not authorized to accept certain ferrous metal. Petitioner's shredder was not enclosed and petitioner proposed to accept ferrous metals. *Id.* at 29a-30a.

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[1] An applicant that is rejected by the Board normally must wait one year before submitting a second application unless the applicant can show that the second application was "substantially different" than the first. The Board found that petitioner successfully met this standard. Pet. App. 29a.

2. While, as the district court noted, some respondents had standing as taxpayers to appeal this decision to the Circuit Court for Baltimore City, they instead took steps to assist in the representation and funding of more sympathetic citizens groups to pursue an appeal. Pet. App. 30a. In so doing, respondents provided financial and legal support for the appeal effort without affirmatively disclosing to the citizens groups or to the Court itself respondents' involvement. The citizens groups raised three legal issues with the Circuit Court, one concerning the Board's finding that petitioner's second application was "substantially different" than its first and two issues addressing the problems with the shredder's designation as an MIRF. *Id.* at 31a. As the district court concluded, the claims raised by this suit were neither objectively baseless nor fraudulent. The appeal addressed what the district court described as "bona fide legal issues" including the standing of the citizens groups and whether the Board had used the appropriate legal standard in approving the application. *Id.* at 21a. Likewise, the Fourth Circuit found that "an objective litigant could reasonably expect to achieve success on the merits." *Id.* at 10a.

Petitioner moved to dismiss the citizens groups' appeal. Petitioner argued that the citizens groups lacked standing to appeal. In response, a member of one of the groups, Gloria Sipes, moved to intervene, and petitioner opposed that motion as untimely. Pet. App. 31a. This case was initially assigned to Associate Circuit Judge Ward. He granted Sipes' motion to intervene and denied the motion to dismiss the citizens groups' for lack of standing. *Id.* at 31a-32a. The case was then assigned to Circuit Court Chief Judge I. H. Hammerman to be heard on the merits. The Chief Judge expressed agreement with Judge Ward's rulings on intervention and standing. *Id.* at 32a.

Judge Hammerman initially found merit to the citizens groups' argument that the facility was plainly not an MIRF

and therefore could not be approved as such.[2] Accordingly, the matter was remanded to the Board for reconsideration. Pet. App. 32a. In petitioning Judge Hammerman to reconsider the remand to the Board, petitioner submitted an affidavit from the Board's Chairman claiming that the references to an "MIRF" were inadvertent and that the Board meant to approve the application on other grounds. *Id.* at 34a. The court accepted this remarkable amendment to the agency's formal decision. Accordingly, based on this new evidence, Judge Hammerman affirmed the Board's decision. *Id.* at 35a.

3. The citizens groups moved to stay enforcement of Judge Hammerman's decision pending an appeal to the Maryland Court of Special Appeals. During this time, an "errant fax" revealed the involvement of respondents in supporting the appeal effort behind the citizens groups. Pet. App. 36a. Petitioner drew attention to this issue in opposing the motion to stay enforcement. Judge Hammerman denied the motion to stay and, in his opinion, recognized respondents' "role as an active participant" in the legal effort to oppose petitioner's application. *Id.* at 38a. Notwithstanding this disclosure, the citizens groups and Gloria Sipes pressed their appeal to the Maryland Court of Special Appeals with respondents' support.[3] That court in a lengthy opinion ultimately con-

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[2] While denying the citizens groups' argument that the second application was not substantially different than the first, Judge Hammerman's comments indicated that that ground for appeal also raised serious issues. Pet. App. 32a.

[3] Petitioner implies that, had Ms. Sipes known about the source of the litigation's support, the appeal would not have gone forward. Pet. 7. In fact, she did pursue the appeal for many months after the respondents' support was fully revealed. Furthermore, as the district court points out, it is unclear from Ms. Sipes' statements whether she still would have pursued the appeal even with knowledge of respondents' aid. Moreover, Ms. Sipes was not the only appellant and, as the district court found, the appeal would likely have gone forward without Ms. Sipes. Pet. App. 51a

cluded that the citizens groups lacked standing to challenge the Board's zoning decision and that Sipes' intervention was not timely. The Court made a "logical extension" of analogous federal and state law to disallow Sipes' claim to relate back to the time when the groups timely filed their appeal. *Sipes* v. *Board of Mun. & Zoning Appeals*, 635 A.2d 86, 95-99 (Md. Ct. Spec. App. 1994). Petitioner constructed its shredder during the appeals and began operating the shredder in July 1993.

4. Petitioner filed this lawsuit in the United States District Court for the District of Maryland. Petitioner alleged that respondents' activities in opposing the construction of the shredder which petitioner claims was delayed by approximately 18 months, constituted a violation of Section 1 of the Sherman Act. 15 U.S.C. § 1;[4] Pet. App. 21a. The district court found that respondents' activities qualified for immunity under the *Noerr-Pennington* doctrine[5] that protects a party that petitions the government for redress, even if that party may have anticompetitive motivations for its actions. *Id.* at 41a. The district court further found that Respondents' conduct did not fall within any exception to the doctrine.[6] First, the court concluded that the appeal of the Board's

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n.36. Indeed, in the Fourth Circuit's view, respondents' actions toward the citizens groups "fails to rise to the level of fraud among the parties" and "falls far short of showing the type of fraud upon the court that would deprive the litigation of its legitimacy." *Id.* at 16a.

[4] Petitioner also alleged six state law tort counts in its complaint. Pet. App. 39a. They were dismissed by the district court based upon *Noerr-Pennington*. *Id.* at 56a-57a.

[5] The *Noerr-Pennington* doctrine derives its name from *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965), that jointly set out the doctrine described in the text.

[6] With the parties' concurrence, the district court bifurcated discovery limiting initial discovery to whether the *Noerr-Pennington* exceptions apply.

decision with respondents' assistance was not a "sham" because the legal issues raised were not objectively baseless. *Id.* at 47a. Second, any misrepresentations by respondents regarding their backing of the citizens suits did not invoke any putative "fraud exception" to *Noerr-Pennington* because the alleged fraud was not the type of "deceptive conduct which goes to the core of a lawsuit's legitimacy."[7] *Id.* at 49a. The district court consequently granted summary judgment in favor of the respondents on all counts. *Id.* at 57a.

5. The Fourth Circuit unanimously affirmed, holding that respondents' actions were protected by the *Noerr-Pennington* antitrust immunity. The court of appeals ruled that the appeal was not a sham as "an objective litigant could reasonably expect to have success on the merits." Pet. App. 11a. In addition, the court found no merit to petitioner's claim (raised for the first time on appeal) that *Noerr-Pennington* immunity is inapplicable to non-parties to the litigation. *Id.* at 11a-13a. Finally, the Fourth Circuit affirmed the district court's view that, if a fraud exception to *Noerr-Pennington* exists, it does not apply to a case like this where none of defendants' alleged frauds "infect[ed] the core of the litigation's legitimacy." *Id.* at 17a.

REASONS FOR DENYING THE PETITION

1. Petitioner raises two questions in its petition, neither of which presents a remotely legitimate conflict or question of national import that would warrant resolution by this Court. Petitioner first urges (Pet. 13) the Court to grant review to decide an issue that is manifestly not presented in this case – whether a fraud exception exists under *Noerr-Pennington*.

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[7] Indeed, the only alleged misrepresentations to the court (Irwin's statements concerning respondents' support) were not made in a hearing on the merits, but in a hearing on the motion to stay, which motion petitioner won, and at which hearing Judge Hammerman recognized respondents' "role as an active participant." See Pet. 37a-38a.

The court of appeals assumed that such an exception was available and then held that petitioner's charges, in any event, were insufficient to demonstrate the kind of fraud that would justify stripping respondents' actions of immunity from the antitrust laws. Thus, to the extent there is a conflict in the circuits on this issue, which there is not, petitioner has no basis to complain because it received the benefit of the most favorable rule available and its claims still were not sufficient. At the end of the day, the primary issue that petitioner poses is simply not presented by the holding below.

What is presented by the holding of the Fourth Circuit is a straightforward application of a fraud exception as that concept was hypothesized by this Court in *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49, 61-62 n.6 (1993) ("*PRE*"). This Court emphasized that, even if an exception exists, the "reprehensible practice" must be such as to "corrupt the administrative or judicial processes" before any argument could be persuasively offered to strip a defendant of *Noerr-Pennington* immunity. *Id.* That is exactly the standard used by the courts below in holding that any misconduct was still protected from Sherman Act scrutiny. Pet. App. 14a.

Nor was this Court's focus on corrupting the process of only passing interest. This is precisely the legal standard that flows from the Court's earlier decision in *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965), where a fraud on the patent office was central to the issuance of a patent and thereby vitiated the administrative process. Certainly, nothing in *PRE* or *Walker Process* invites federal courts to use the Sherman Act to police litigant conduct that does not affect the litigation process, much less deprive that process of all "legitimacy."

There is no merit to petitioner's assertion (Pet. 3) that the lower courts are in disarray concerning the proper approach to dealing with a fraud exception in the wake of *PRE*. Petitioner concedes that the holding of the Fourth Circuit is squarely

consistent with decisions of the Third and Ninth Circuits. Those courts expressly have focused on whether the actions of the defendant "infect the core of [the] case." Pet. App. 14a (internal quotation marks omitted); *Cheminor Drugs, Ltd.* v. *Ethyl Corp.*, 168 F.3d 119, 123-24 (3d Cir. 1999);[8] *Liberty Lake Inv., Inc.* v. *Magnuson*, 12 F.3d 155, 157-59 (9th Cir. 1993); *Kottle* v. *Northwest Kidney Ctrs.*, 146 F.3d 1056, 1060 (9th Cir. 1998). Here, of course, both courts below concluded that any misconduct by respondents was completely immaterial to the litigation. That determination plainly does not warrant further review by this Court.

The cases cited by petitioner from other circuits simply do not conflict with the Fourth Circuit's position regarding a materiality requirement in the application of a fraud exception to *Noerr-Pennington*. In the first place, most of the decisions pre-date *PRE* and thus do not have the benefit of this Court's most relevant observations on the issue. See *Woods Exploration & Producing Co.* v. *Aluminum Co. of Am.*, 438 F.2d 1286 (5th Cir. 1971); *St. Joseph's Hosp. Inc.* v. *Hospital Corp. of Am.*, 795 F.2d 948 (11th Cir. 1986); Pet. 17-18. How those courts will respond to that reasoning and whether

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[8] Petitioner's focus on the confusion in the Third Circuit demonstrates most plainly why review in this case is not warranted. Whether this Court were to adopt the rule in *Cheminor* or in *Armstrong Surgical Center, Inc.* v. *Armstrong County Memorial Hospital*, 185 F.3d 154 (3d Cir. 1999), *cert. denied*, 530 U.S. 1261 (2000), petitioner's lawsuit would be dismissed. Thus, the decisional problems that the Third Circuit arguably needs to resolve are purely of academic interest to petitioner. Similarly, petitioner's focus on the brief of the Solicitor General in *Armstrong* is completely misplaced. In that case, the Third Circuit refused to recognize a fraud exception to *Noerr-Pennington* in circumstances of a direct challenge to the decision of a state regulatory body. That ruling, of course, is of no benefit to petitioner. Nonetheless, the United States urged the Court not to grant that petition and this Court followed that recommendation. U.S. Br. at 20. It follows, *a fortiori*, that the Court should not review the decision here in which the court of appeals entertained such an exception, but found petitioner's arguments inadequate.

there is a real difference in opinion when the issue is squarely posed for those courts is a matter of conjecture and provides no basis for action by the Court now.

Moreover, all that the cases cited by petitioners hold is that a fraud exception to *Noerr-Pennington* may be available in the context of a material misrepresentation. They do not address, much less conflict, with the reasoning of the Fourth Circuit that the alleged fraud must be such as to deprive the underlying judicial process of its "legitimacy." Indeed, in all of those cases, the fraudulent submission played a central role in the government proceeding and fundamentally threatened the legitimacy of the process.[9] The Fourth Circuit principle that only material misrepresentations that infect the core of the judicial process are not entitled to antitrust immunity, is consistent with, not in conflict with, the principles that underlie the cases from other circuits. Simply characterizing these cases as recognizing a "freestanding" fraud exception (as opposed to application of a fraud exception in conjunction with the *PRE* sham test) does not create a circuit conflict, particularly when the underlying principles are compatible. And, at no point do petitioners cite to a case upholding the rule that they seek here, *i.e.*, that any fraud or misrepresentation that has *no* material impact on the underlying adjudication causes the loss of *Noerr-Pennington* immunity.

Petitioner also attempts to contrast the Fourth Circuit's holding with two cases that petitioner asserts "consider[] claims of fraud under the general test for sham litigation." Pet. 19. Again, these cases were decided prior to this Court's decision in *PRE*, and thus make petitioner's distinction largely irrelevant. See *Landmarks Holding Corp.* v. *Bermant*,

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[9] *See, e.g.*, *Whelan* v. *Abell*, 48 F.3d 1247, 1255 (D.C. Cir. 1995) (finding that "[h]owever broad the First Amendment right to petition may be, it cannot be stretched to cover petitions *based on* known falsehoods" and citing to *Liberty Lake*'s requirement that a fraud deprive a litigation of its legitimacy) (emphasis added).

664 F.2d 891, 892-97 (2nd Cir 1981); *Potters Med. Ctr.* v. *City Hosp. Ass'n*, 800 F.2d 568 (6th Cir. 1986). Any sham analysis formulated before this Court set out the parameters of the sham exception and identified its potential distinction with a separate fraud exception is subject to clarification. Moreover, the mere fact that the courts in both of these opinions cited to language in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 513 (1972), opining on how "unethical conduct" in the adjudicatory process should be unprotected by *Noerr-Pennington* immunity hardly demonstrates a conflict with the Fourth Circuit's decision here.

Further, the reasoning used in these cases again does not conflict with the analysis of the Fourth Circuit. In *Landmark*, the defendant pursued litigation regardless of merit, using multiple tactics of delay, which included filing numerous appeals and supporting other frivolous lawsuits, all in hopes of using the administrative process to delay and discourage a competitor. *Landmarks Holding Corp.*, 664 F.2d at 892-97. This case clearly fits under the past and present sham exception – objectively baseless, subjectively ill-motivated, and displaying a pattern of repetitive meritless claims – thus negating any need for a court even to address issues of fraud. *Id.* at 896. Similarly, in *Potters Medical Center*, the court applied the sham test and found that defendant's conduct did not consist of "baseless, repetitive claims" or "an abuse of process" to threaten defendant's antitrust immunity. *Potters Med. Ctr.*, 800 F.2d at 579. Neither of these holdings conflicts with the principle espoused in *Baltimore Scrap* that a fraudulent act must be material to warrant exclusion from *Noerr-Pennington* immunity. The fraudulent activity alleged in this case does not come close to fitting within any iteration of a fraud exception to the *Noerr-Pennington* doctrine as iterated by any of the circuits. Accordingly, this case does not warrant further review.

2. Petitioner poses (Pet. 23-26) a second question for review, *viz.*, whether a third party that lacks standing on its own to bring litigation retains the protection of *Noerr-Pennington* immunity when funding another party in the litigation. Petitioner relies on *In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987), a Fifth Circuit case decided prior to *PRE*, as the primary source of circuit disagreement over this issue. *Burlington Northern* affirmatively held that *Noerr-Pennington* does not apply to a third party providing funding to a party in a lawsuit in which it has no standing. *Id.* at 530.

In the first place, the respondents actually did have independent standing to appeal the Board's decision. The district court, which is in the best position to understand Maryland law, in relating the factual background of this case, observed that as taxpayers "[t]he defendants had standing to appeal the BMZA's decision to the Circuit Court for Baltimore City," but for strategic reasons, decided instead to back a citizens group appeal.[10] Pet. App. 20a. Thus, this case does not even present the question urged by petitioner. Second, *Burlington Northern* not only pre-dated *PRE*, but this Court "specifically disapproved of *Burlington Northern*" in its *PRE* opinion. 508 U.S. at 55 n.3; Pet. App. 12a. Moreover, the Fourth Circuit's holding that *Noerr-Pennington* is not so restrictive as to protect only the actual litigants from antitrust liability without also covering third parties backing a suit lines up directly behind the rule of the Ninth and Sixth Circuits. See Pet. App. 11a (citing *Liberty*

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[10] Based upon the Baltimore City ordinances as interpreted throughout the 1990s, both petitioner in this appeal, petitioner's attorney in the zoning proceeding, and the Maryland Court of Special Appeals concurred that taxpayers had standing to appeal the BMZA decision. *See Sipes v. Board of Mun. & Zoning Appeals*, 635 A.2d 86, 91-92 (Md. Ct. Spec. App. 1994) (pointing out the lack of dispute over an individual taxpayer's standing to appeal the Board's decision). Petitioner's citation to the Maryland Court of Special Appeals' decision in 2001 has no relevance to respondents' standing in 1992. Pet. 23 n.10.

Lake, 12 F.3d, at 157-59; *Opdyke Inv. Co.* v. *City of Detroit*, 883 F.2d 1265, 1273 (6th Cir. 1989)).[11] Petitioner attempts to portray *Liberty Lake* as being in conflict with the holding here. Pet. at 25. In fact, the application of *PRE* in *Liberty Lake* fully supports the Fourth Circuit's position that, as long as a suit has objective merit and potential fraud does not deprive the litigation of its legitimacy, then the supporters of the suit receive immunity under the "sham" test regardless of their standing. *Liberty Lake*, 12 F.3d at 158-59. Given the doubt cast upon *Burlington Northern* by this Court and the consistent holdings of the other circuits, it is doubtful whether the Fifth Circuit would retain its aberrational approach to this issue. If it does, then this Court can review the issue at that time.

3. Finally, petitioner's argument that the questions raised by this case are of such national import as to merit certiorari is at best an exaggeration. While abuse of the adjudicatory process is of course a serious concern, it is one that has hardly been ignored by this and the other circuit courts. Rather, the court of appeals' opinions in this area reflect careful and appropriate attention to petitioner's concerns. The developing

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[11] Numerous other decisions, not cited by the Fourth Circuit, extend *Noerr-Pennington* to those supporting litigation. *E.g. AroChem Int'l, Inc.* v. *Buirkle*, 968 F.2d 266, 272 (2d Cir. 1992) ("It is not independently tortious to finance another's litigation."); *Federal Prescription Serv., Inc.* v. *American Pharm. Ass'n*, 663 F.2d 253, 268 (D.C. Cir. 1981) (defendents "cannot be held liable . . . for . . . financing lawsuits"); *South Dakota* v. *Kansas City S. Indus.*, 880 F.2d 40, 53 (8th Cir. 1989) (assuming defendant was not a formal party but assisted others, its participation "did not . . . constitute 'sham' petition"); *Garst* v. *Stoco, Inc.*, 604 F. Supp. 326 (E.D. Ark. 1985); *Wilmorite, Inc.* v. *Eagan Real Estate, Inc.*, 454 F. Supp. 1124 (N.D.N.Y. 1977) (developers who organized and financed property owners to oppose a competing development enjoy *Noerr-Pennington* immunity), *aff'd*, 578 F.2d 1372 (2d Cir. 1978); *Pacific Gas & Elec. Co.* v. *Bear Stearns & Co.*, 791 P.2d 587 (Cal. 1990). None of these cases requires that the party supporting the litigation must have standing in its own right to have *Noerr-Pennington* protection.

precedent in this area continues a prudent balance between preserving the First Amendment right to petition the government and punishing fraudulent activity that corrupts the core of a proceeding's legitimacy, while also respecting federalism concerns by not burdening state actors with federal judicial review through antitrust litigation. "Liability for injuries caused by . . . wrongful . . . conduct [by private parties] . . . . rests with laws addressed to it and not with courts looking behind sovereign state action at the behest of antitrust plaintiffs." *Armstrong Surgical*, 185 F.3d at 162.

Petitioner claims that Respondents' "covert funding and direction of litigation" somehow "threatens to corrupt" the *Noerr-Pennington* doctrine and "undermine the sham exception to *Noerr*." Pet. 26. But in reality, as the Fourth Circuit points out in this case, "non-parties often provide aid to litigants, whether through financial backing, legal assistance, amicus briefs, or moral support." Pet App. 13a. In fact, such support often enables parties in interest to pursue legitimate litigation when they lack financial or legal resources to do so.[12] *Id.* The rights and benefits associated with providing such aid is not negated by the anticompetitive motivations of the supporter or their interest in remaining secret. *Id.*

Further, truly fraudulent or otherwise improper activity in the adjudicatory process is already more appropriately remedied through other safeguards including state laws regulating misbehavior in the court room. See Pet. App. 17a. Antitrust laws are not a suitable mechanism for regulating improper conduct, particularly for conduct that is not material to the legal process at issue. The Sherman Act is a heavy-handed way to police such conduct in light of the serious federalism concerns involved in frequent federal court review of state government proceedings. See *id.* at 8a-9a.

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[12] Petitioner even points out in its brief that the citizens groups in this case lacked the funding to pursue this appeal without respondents' support. Pet. 7.

While of course "[m]isrepresentations and fraud are dangerous to the adjudicative process," petitioner is wrong in arguing that the holding below permits litigants to make false representations to the court and win their case. Pet 27-29. These allegations do not apply here: 1) respondents did not prevail in their appeal of the Board's decision; 2) the challenges to the decision were not objectively baseless; and 3) the alleged misrepresentations were immaterial to the court's determination. This is precisely a case where *Noerr-Pennington* should apply.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 00-1592

In the Supreme Court of the United States

BALTIMORE SCRAP CORP.,

Petitioner,

v.

THE DAVID J. JOSEPH COMPANY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

When a monopolist uses the governmental ***process*** – as opposed to the ***outcome*** of that process – as an anticompetitive weapon, and succeeds by fraud in causing citizens to delay the entry of competition by bringing a lawsuit that they would not have brought but for the fraud, does the *Noerr-Pennington* doctrine preclude imposition of the liability that would ordinarily attach to exclusionary acts by one who has monopoly power? That is the first question presented by the petition for a writ of certiorari. Both the opinion of the Fourth Circuit and respondents' brief in opposition, however, fail to address that question in a meaningful way. Both the Fourth Circuit and respondents focus on whether respondents' fraud affected the ***outcome*** of the zoning litigation, but of course it did not: petitioners ***won*** that lawsuit. The relevant question is whether respondents' fraud affected the governmental ***process***. On that subject, respondents have virtually nothing to say.

When a monopolist does not petition the government for redress of ***its*** grievances (namely, its dislike of competition), but instead funds ***others'*** efforts to petition the government for redress of ***their*** (environmental) grievances, has the monopolist engaged in conduct that deserves *Noerr* protection at all? That is the second question presented by the petition, and it is not (as the Fourth Circuit thought) a question of what "exceptions" to *Noerr* are recognized. Rather, it is a fundamental question of defining the baseline protections of *Noerr* itself. On that subject again respondents have virtually nothing to say, except to contend, contrary to the Fourth Circuit's assumption and to Maryland law, that they ***would have*** had standing ***if*** they had exercised their right of petition.

Both questions presented are the subjects of conflicts in the circuits. The Court should grant certiorari to address those conflicts and to correct the seriously misguided approach of respondents and the court below.

1. When a judgment in a court or agency has been ***procured by*** fraud, and is anticompetitive, a serious issue as to the scope of *Noerr-Pennington* immunity arises. See 1 P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶¶ 203f3, 205c (2d ed. 2000); *Armstrong Surgical Center, Inc.* v. *Armstrong County Memorial Hospital*, 185 F.3d 154, 166-174 (3d Cir. 1999)

(Schwartz, J., dissenting), cert. denied, 530 U.S. 1261 (2000). Although facially such activity deserves no First Amendment petitioning protection, an antitrust court nevertheless is placed in the awkward situation of second-guessing whether the fraud ***caused*** the court or agency to decide as it did. The causation inquiry produces the potential embarrassment of one court saying that a different court or agency was defrauded when the latter court may not have spoken, and the inquiry raises serious federalism issues when the allegedly defrauded court or agency is a state body. This recurring problem with Sherman Act lawsuits asserting a fraud exception to *Noerr-Pennington* immunity when the antitrust defendant has ***successfully*** litigated a prior lawsuit has been recognized by, among others, Professor Areeda[1] and the Solicitor General.[2]

Cases like this one – in which the antitrust defendant was ***unsuccessful*** on the merits in state court but did succeed in causing delay, see Pet. App. 41a ("The defendants concede that their conduct was anticompetitive * * *.") – raise different issues and require different analysis.[3] The antitrust court is not called on to question what motivated the state judges or officials to rule as they did, because their ruling inflicted no harm on the antitrust plaintiff. The "federalism" concern (Br. in Opp. 13; Pet. App. 18a) is a straw man.[4]

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[1] AREEDA & HOVENKAMP, *supra*, ¶ 202c; *id.* ¶ 205c2, at 231-232.

[2] See Brief for the United States and the Federal Trade Commission as Amici Curiae at 16-18, *Armstrong Surgical Center Inc.* v. *Armstrong County Memorial Hospital*, 185 F.3d 154 (3d Cir. 1999), cert. denied, 530 U.S. 1261 (2000) (No. 99-905). The Solicitor General observed in particular: "the adjudication of such claims could * * * risk federal intrusion into the state decision-making process." *Id.* at 17.

[3] See AREEDA & HOVENKAMP, *supra*, ¶ 203f4, at 179 ("We have been discussing false information that may have contributed to an anticompetitive governmental decision. ***In addition, false information might directly injure the plaintiff by forcing * * * litigation that would otherwise have been unnecessary***.") (emphasis added).

[4] It is true – but quite irrelevant – to observe that "[t]he states are perfectly capable of handling malfeasance in their own courts" and that "[f]ederal antitrust law is simply not the proper vehicle to punish an attorney's misconduct in state court." Pet. App. 17a. Federal antitrust law

When the harm of which the antitrust plaintiff complains is anticompetitive delay through governmental processes, not the anticompetitive effects of governmental decisions, the only logical analysis asks whether the ***delay*** was caused by protected petitioning activity, or was instead caused by unprotected activity that the Sherman Act can legitimately reach, such as fraud.[5] Yet the Fourth Circuit and respondents ask and answer an entirely different question. See Pet. App. 16a ("***The result*** would have been the same even if Irwin had admitted the defendants' role because ***no judicial ruling was based on*** the erroneous assumption that the citizens alone were pursuing the appeal and fully funding the litigation.") (emphasis added); Br. in Opp. 8 ("Here, of course, both courts below concluded that any misconduct by respondents was ***completely immaterial to the litigation***.") (emphasis added). In cases such as this one, the answer to that question will ***always*** favor the antitrust defendant, because by definition it achieved no favorable litigation ***outcome*** through its fraud.[6] That cannot be the correct way to

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is the proper vehicle to compensate the victim of anticompetitive conduct that, because it involved fraudulent activities, is not protected petitioning activity. That the anticompetitive activity that resulted in injuries cognizable under federal law ***also*** may have involved some instances of attorney misconduct punishable under state law is hardly a reason to deny an injured plaintiff its federal remedy.

[5] See generally R. BORK, THE ANTITRUST PARADOX 348-349 (1978) ("The predator need not expect to defeat entry altogether. He may hope only to delay it. * * * [The relative ease of this form of predation] indicates both the danger and the probability of predation by misuse of government processes. This mode of predation is particularly insidious because of its relatively low antitrust visibility. * * * The antitrust laws can make a major contribution both to free competition and to the integrity of administrative and judicial processes by catching up with this means of monopolization.").

[6] Thus, respondents would deny all antitrust protection to those who suffer anticompetitive delay from non-baseless litigation if the pursuit of the litigation was caused by fraud but the outcome was not affected by fraud. They say so explicitly. Br. in Opp. 14 ("1) [R]espondents did not prevail in their appeal of the Board's decision; 2) the challenges to the decision were not objectively baseless; and 3) the alleged misrepresentations were immaterial to the court's determination. This is precisely a case where *Noerr-Pennington* should apply.").

analyze a case in which the defendant is alleged, through fraud rather than through baseless litigation, to have achieved the anticompetitive end of delay.

The incoherence of this approach is not just a function of idiosyncratic reasoning applied by the court below. Rather, it is a byproduct of the very legal standard – which conflicts with the standards applied in the Fifth, Eleventh, and D.C. Circuits – that requires that a fraud deprive the litigation of its legitimacy before it can strip away *Noerr-Pennington* protection. To inquire into the "legitimacy" of the lawsuit is to collapse the fraud/misrepresentation exception recognized in *Walker Process* and *California Motor Transport* into the baseless-litigation exception recognized in *PRE*.[7] Yet, as we showed in the petition and as the Solicitor General acknowledged in his *Armstrong Surgical* amicus brief, the Fifth and Eleventh Circuits before *PRE*, and the D.C. Circuit in an opinion by Judge Williams after *PRE*, have held that there is a ***freestanding*** fraud exception, ***not*** requiring the plaintiff to meet the same criteria as the baseless-litigation exception.

Respondents assert that "petitioner has no basis to complain because it received the benefit of the most favorable rule available and its claims still were not sufficient." Br. in Opp. 7. To make that false assertion, respondents are required to engage in two errors. *First*, as already discussed, respondents gloss over the Fourth Circuit's failure to make any inquiry at all into the relationship between respondents' misrepresentations and the anticompetitive delay, focusing instead on the relationship between respondents' misrepresentations and the outcome of the litigation. That the Fourth Circuit's focus was misdirected is particularly apparent in this case, because respondents themselves recognized early on that anticompetitive delay, not an anticompetitive litigation outcome, was what they could expect to achieve.[8] They likewise recognized near the end of the

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[7] *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 177-178 (1965); *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 512-513 (1972); *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993) (*PRE*).

[8] See C.A. App. 6026-6029, 3956 (I.D. Shapiro was advised by an attorney he was attempting to hire to represent the citizens that petitioner's

process that delay was what they ***had*** achieved. When I.D. Shapiro successfully asked respondent The David J. Joseph Company in 1993 to reimburse him for legal fees, he "boasted that he had 'saved [the DJJ president] so far by full-time maneuvering two years.'" Pet. App. 35a.

Second, respondents misstate the record. The record shows – or at least shows sufficiently to create a genuine issue of material fact, foreclosing summary judgment – that no one with even arguable standing would have appealed the zoning decision if respondents' secret funding had been disclosed to the environmentally concerned citizens. The testimony of Gloria Sipes – which respondents dismiss as "unclear" (Br. in Opp. 4 n.3) – was in fact pellucid (C.A. App. 6117, 6151):

> [QUESTION]: When the woman called you in the beginning, [if] she had told you that United Iron and Metal would be paying for Mr. Irwin, would you have accepted their money[?]
>
> [SIPES]: No
>
> * * * * *
>
> Number one, like I said before, if I'd known United Iron & Metal was involved, I would never have accepted the check or even the offer.

Respondents' effort in the same footnote to get around Sipes's testimony, by asserting that "Ms. Sipes was not the only appellant and * * * the appeal would likely have gone forward without Ms. Sipes," is equally unavailing. Gloria Sipes ***was*** the only individual appellant. And the citizens who were involved with the citizen ***groups*** (which lacked standing) hardly expressed the desire or had the ability to go forward with the litigation if they had known the truth. The ***only*** citizen who affirmatively said that she would have pursued litigation anyway, had she known the source of the litigation funding, was Mary Rosso, who did

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BMZA "presentation looked good" but he could be "confident" that he could cause "delay in court"); see also Pet. App. 26a-27a (July 18, 1991, memo by David Workum, an executive of one of the respondent companies: "Through connections of I.D. Shapiro and Warren Rich, we are trying to block [petitioner's] move to install a shredder.").

not live in Baltimore City and therefore lacked standing to pursue litigation on her own. C.A. App. 5869, 5875-5876; *Windsor Hills Improvement Association, Inc.* v. *Mayor and City Council of Baltimore*, 73 A.2d 531, 535 (Md. 1950). The other citizens involved in the litigation, Doris McGuigan and Delores Barnes, testified that they did not know who was funding the litigation and certainly did not give affirmative testimony that they would have pursued the litigation if they had known the truth. C.A. App. 5597-5598, 5772.[9]

Respondents also emphasize that Ms. Sipes "did pursue the appeal for many months after the respondents' support was fully revealed." Br. in Opp. 4 n.3. But the fact that the citizens did not abandon ***pending*** litigation when they belatedly learned that their funding came from a source they considered disreputable is a far cry from the proposition that they would have ***started*** down that path had they known the truth at the beginning. A finder of fact certainly could conclude on this record that no litigation would have taken place, and petitioner would have been in business and in competition with respondents much sooner, if respondents had not hidden the truth from the citizens who unwittingly served respondents' anticompetitive purposes.

Such a finding would be sufficient to overcome *Noerr-Pennington* immunity in any circuit that recognizes a free-standing fraud exception, but is irrelevant under the Fourth Circuit's analysis, which misguidedly asks whether the fraud affected the ***outcome*** of the unsuccessful lawsuit that resulted in anticompetitive delay. See Pet. App. 16a.[10] The Court should

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[9] Respondents say that "the district court found" that the litigation "would likely" have occurred without Ms. Sipes. Br. in Opp. 4 n.3 (citing Pet. App. 51a n.36). Although the district court's opinion does contain some observations along those lines in a footnote, the district court was not entitled to make findings of fact in deciding a motion for summary judgment, and the record evidence discussed in text certainly created at least a genuine issue of material fact. Furthermore, the district court's footnote speculates without ***any*** record support that Ms. McGuigan might have gone ahead with the litigation, and relies on Ms. Rosso's testimony without taking note of her obvious lack of standing.

[10] The Fourth Circuit came closest to addressing the relevant question – but in fact did not address it – when it said that "the citizen groups were not

grant certiorari to resolve the conflict in the circuits, correct the Fourth Circuit's legal error, and allow a finder of fact to determine whether the anticompetitive lawsuit would have been pursued in the absence of respondents' misrepresentations.

2. Respondents acknowledge the existence of a conflict in the circuits on the second question presented. Br. in Opp. 11-12 (recognizing holding in *In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987)). They argue, however, that the conflict is unworthy of resolution by this Court because (a) *Burlington Northern* is a discredited decision that antedated *PRE;* and (b) *Burlington Northern* depends on the absence of standing in the parties who covertly funded litigation, and respondents actually did have standing. But the analysis of ***this point*** in *Burlington Northern* has not been discredited and is sound. Furthermore, respondents did not have standing, nor did the Fourth Circuit assume that they did.

The supposed "disapprov[al]" (Pet. App. 12a, cited in Br. in Opp. 11) of *Burlington Northern* consists of a footnote in *PRE* observing that the Fifth Circuit would allow even a successful lawsuit to be held a "sham" if the suit was not significantly motivated by a genuine desire for judicial relief. 508 U.S. at 55 n.3 (citing 822 F.2d at 528). But that holding of *Burlington Northern* was completely unrelated to the Fifth Circuit's holding, in a separate subsection of its opinion (822 F.2d at 530-532), that a party that neither appears in the litigation nor would have standing to do so is unprotected by *Noerr*. Professors Areeda and Hovenkamp continue to devote an entire subparagraph of the 2000 revision of their treatise to this aspect of *Burlington Northern*, without even mentioning *PRE*'s disapproval of a different aspect of the case. AREEDA & HOVEN-

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duped into pursuing a claim they did not want to litigate." Pet. App. 15a. True, the citizens and citizen groups ***did*** want to litigate the claim they litigated. But the relevant question – a factual one – is whether the citizens and groups ***would have*** litigated the claim ***even if*** they had known that respondents were the only source of funding to do so (in other words, not whether they wanted to litigate but whether they wanted to litigate ***enough*** to accept respondents' funds to do so). The Fourth Circuit did not purport to answer ***that*** question, nor could it possibly have answered that question in favor of respondents applying the proper summary judgment standard to this record.

KAMP, *supra*, ¶ 205d3. With no hint of disapproval or of a perception that the precedential value of *Burlington Northern* in this respect has been undermined, Professors Areeda and Hovenkamp observe that the case stands for the proposition "that a party lacking standing itself enjoys no *Noerr* protection when it supplies the financial support for the litigation of another." *Id.* ¶ 205d3, at 237. The decision below directly contradicts that proposition. Pet. App. 13a.[11]

Moreover, that holding of *Burlington Northern* comports fully with this Court's cases. *Noerr* gives weight to "political activity" through which "the people * * * freely inform the government of their wishes," and relies to a large degree on the "ability of persons to make their wishes known to government." *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). Neither the First Amendment right to petition, nor *Noerr*, nor any other decision of this Court extends immunity to those who misuse the litigation process[12] and do not present their wishes to government, but rather covertly fund the expression of ***someone else's*** views. The predicate for application of the *Noerr-Pennington* doctrine is simply absent. Cf. Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of* Noerr, 74 GEO. L.J. 65, 123 (1985) ("Although resolution of these cases may turn on some knotty factual issues, one approach that may prove useful is simply to ask: 'Is it petitioning?'").

Aside from their fruitless effort to discredit *Burlington Northern* and diminish the significance of the conflict in the cir-

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[11] The decision below also collapses this inquiry into the baselessness inquiry in the same improper way that it did on the first issue: "As [the district] court noted, Baltimore Scrap has 'fail[ed] to show how the legal questions raised by the citizens groups in the zoning appeal would have lacked objective merit had the role of the defendants been known.'" Pet. App. 13a. Claims that lack objective merit fall within an ***exception*** to *Noerr* immunity. On this issue, however, petitioners' contention is not that an exception applies, but rather that no immunity applies to begin with because respondents did not petition the government and lacked standing to do so. The Fourth Circuit could not properly establish an immunity by negating an exception.

[12] Even the Fourth Circuit "in no way condone[d] the actions of the defendants." Pet. App. 15a.

cuits, respondents try to escape from the second issue on the ground that they really did have standing. The Fourth Circuit, however, made the opposite assumption for purposes of its decision, and this Court is entitled to do likewise if it wishes not to construe Maryland law. See Pet. App. 12a ("we need not decide whether the defendants themselves had independent standing to pursue the zoning litigation in state court because the standing of third parties does not control the sham litigation analysis").[13]

Should this Court choose to examine Maryland law, it will have little difficulty in concluding that respondents would not have had standing to challenge the BMZA decision.[14] Two defects are independently each fatal to their standing. First, because they did not openly participate in proceedings before the BMZA, respondents could not have taken appeals in their own name, even if they otherwise would have had taxpayer standing.[15] Second, taxpayer standing to appeal a zoning board decision does not exist unless the taxpayer actually is aggrieved in some cognizable way. See Pet. 23 n.10 (citing cases).[16]

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[13] It is true that the standing of third parties does not control the sham litigation analysis. But petitioner contends that *Noerr* immunity does not apply to those who do not petition the government, not that respondents' lack of standing makes their secret involvement fit within the sham exception. Here as elsewhere, the Fourth Circuit plainly erred by trying to fit every aspect of petitioner's case within the baselessness exception recognized in *PRE*. For present purposes, however, the important point is that the Fourth Circuit assumed that respondents did not have standing under Maryland law.

[14] Although respondents tout the conclusion of the district court that respondents did have standing (Pet. App. 20a, quoted at Br. in Opp. 11), that conclusion was simply wrong. Respondents claim that the district court "is in the best position to understand Maryland law" (Br. in Opp. 11), but conclusions of state law are reviewed *de novo* on appeal in the federal system. *Salve Regina College* v. *Russell*, 499 U.S. 225 (1991). The Fourth Circuit neither accepted nor rejected the district court's conclusion, but rather -- in conflict with *Burlington Northern* – deemed it irrelevant.

[15] *Bryniarski* v. *Montgomery County Board of Appeals*, 230 A.2d 289, 293 (Md. 1967); *Slusher* v. *Hanson Road Joint Venture*, 333 A.2d 631, 633 (Md. Ct. Spec. App. 1975); cf. *Simmons* v. *ICC*, 716 F.2d 40 (D.C. Cir. 1983) (Scalia, J.) (similar requirement under federal administrative law).

[16] Respondents state without elaboration that "[p]etitioner's citation to the

In sum, the decision below unquestionably conflicts with the decisional law of the Fifth Circuit, and as the case comes to this Court the Court may assume – or can easily determine – that respondents lacked standing under Maryland law and therefore would have lacked *Noerr* protection in the Fifth Circuit. The Court should grant certiorari to resolve the conflict and to bring much-needed clarity to this important area of the law.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

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MAY 2001

Maryland Court of Special Appeals' decision in 2001 has no relevance to respondents' standing in 1992." Br. in Opp. 11 n.10. Yet they do not assert that the 2001 (and 2000) decisions cited in the petition ***changed*** the law of Maryland. In the absence of such an assertion, it is hard to see why law-clarifying decisions should be disregarded merely because they came after the events in suit.

† Admitted in Massachusetts; application for admission to the Bar of the District of Columbia pending.